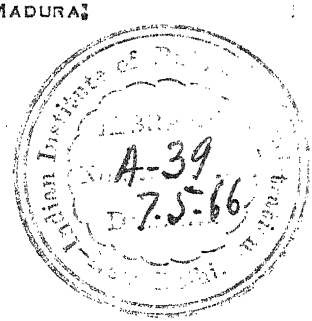
THE
FEDERAL COURT OF INDIA

(A CONSTITUTIONAL STUDY)

BY

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TO

THE MEMORY OF

JOHN MARSHALL,

WORLD'S GREATEST FEDERAL JUDGE.

"SOCIETY, IF I MAY SO PHRASE IT, IS FEDERAL IN ITS NATURE. AND THE AUTHORITY, ACCORDINGLY, THAT IS TO COORDINATE ITS ACTIVITIES MUST CORRESPOND IN STRUCTURE. TO THAT FEDERAL NATURE."

—H. J. LASKI.

AUTHOR'S NOTE

Constitutions when written do not breathe. They get life only when human elements gather and work them. A new shape they assume, a new garb clothes them. Imperceptible they move, invisible they influence, and unseen they control. Their force is seen all over yet none *feels* it, their majesty enforces submission but none looks at the figure which makes the demand. With a form still formless, seen yet unseen, felt yet not feeling, it is a creation of the human hand, and the ingenuity of the human intellect made and fostered to control both. Every evasion of a constitutional principle gives birth to a new constitutional guarantee, and every attempt at loosening the ties of the machinery leads to additional provisions of constitutional safeguards. It is the brain that makes, that undoes and again provides against any further undoing.

Human emotions develop attachments to place, policy and principles. A feeling of one's own is the first impulse of a child. To appreciate 'one's own' is the next step and to estimate it as the best, completes the picture of human pride. From 'individual pride' to 'national pride' it is not a long march; it is only putting the idea in a group-term, it is the expression of the collective mentality of the citizens of a place or a country.

National pride implies national consciousness, born of a sentiment among people who are bound by circumstances similar, customs uniform and outlook resembling closely and not divergent. To be controlled or ruled by such similar individuals, rather than by others differing in everything is the anxious instinct of all creations, more so among human beings. This little anxiety develops into a sentiment, a conviction and when sedulously fostered, into a hatred of anything, not national.

To live in unity among diversity, to form a Nation without sacrificing nationalities and to have a central force maintaining inde-

pendence at the circumference is a later evolution in constitutional outlook. It was a wonder and it is a wonder still, to many.

Difficulties in conceptions are but the index of problems in actual exercise of the ideas. Demarcation of powers, enforcing them, finding solutions in cases of hitch have to be faced in an attempt to coalesce the State and National ideals. An arrangement to get on together with the least friction is a Federal Constitution. But, still in the working of it, wrong understanding of powers, an over-statement of the case, difficulties of minorities or weaklings may crop up and these shall have to be decided impartially.

This impetus to be equitable and judicial, this ideal to do justice to the component parts of a Federal Constitution impartially and rigorously, is responsible for the political expedient of a Federal Court.

The New Reforms have incorporated this as a natural auxiliary to its Federal Political Structure and have given it a statutory basis in the Constitution. The Indian Federal Court is a great improvement, on other models, with greater possibilities of stability, fearlessness and stern impartiality, and is likely to remain unaffected by the ebb and flow of party politics and besetting prejudices.

Attempt has been made in this book to study more the constitutional position of the Court, though the necessary aspects of case-law as relating to the former have not been forgotten. Federation in its modern (Western) form is an experiment and the Federal Court in India is distinctly of an alien origin, an experiment within an experiment called upon to determine the difficulties in running the latter. 'Federal India' will present new and unprecedented problems, as 'Federal India' itself is a deliberate challenge to the accepted notions of political constitutions, so far.

In writing this book, I have had the invaluable help of eminent constitutional thinkers and writers and I have gratefully

acknowledged my debt to them in appropriate places. They have been of great guidance to me and my debt to them will have to remain for ever undischarged. Classic constitutionalists make the world richer and their credit-side enhances as every subsequent writer draws on their intelligence or their productions. It is a consolation that this humble attempt goes to immortalise further the world's debt to a few of its greatest men.

College friendship and colleague's solicitude have been the cause for several suggestions from Mr. S. Padmanaba Chariar B. A, B. L., Advocate and Additional Public Prosecutor of Ramnad, Madura. Mr. K. Somasundaram (Cert. Libr.), Librarian, the Madura College, Madura bore with me the brunt of the work, pleasantly and cheerfully. Mr. A. G. Solomon M. A., (Cert. Libr.,) Librarian, American College, and the whole Library Staff of the Victoria Edward Hall, Madura have assisted me considerably. I cannot forget the services rendered by the staff of the Madura Co-operative Urban Bank Ltd., Madura and my own devoted clerks.

The pressmen have been punctual and kind to me. The manager of the H. S. D. Press, Mr. Ramanuja Alwar spared no pains in this enterprise of mine.

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ச. ந. சுப்பு.

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THE FEDERAL COURT OF INDIA.

CHAPTER I

A FEDERAL COURT—FEDERAL?

A *Federal* Court? Is the appellation or adjective given to the 'Court' correct? What constitute the Federation? Have they the constitutional character to give birth to a Federal structure? The obviously unoffending innocent title sets us thinking.

Sec. 5 of the Government of India Act lays down that the following shall be united in a Federation under the Crown by the name of the Federation of India.

(a) the Provinces hereinafter called the Governor's Provinces *and*

(b) the Indian States which have acceded or may thereafter accede to the Federation.

So the two elements in the forthcoming Federation are the Provinces on the one hand and the Indian States on the other. The union between the two is caused by a "declaration in a proclamation that as from the day appointed they shall stand united."

Ordinarily a federal state is an union of several *Sovereign* States based *first* upon a treaty between those states or upon some historical status common to them all and *secondly* upon a federal constitution accepted by the citizens.[1] Are the provinces sovereign states? Do the Indian States possess a 'sovereign' character?

1 *Federated and Unified Constitutions* By A. P. Newton, Longmans p. 5.

This leads us to a recapitulation of the constitutional status of the provinces under the present Act *e.g.* before 1935 Act is inaugurated. Provinces can never be said to be 'sovereign' in any aspect. The growth of British India has been due and based upon several political incidents. Any organized evolution was impossible in the very nature of things, much less a systematised constitutional development. It has been a case of independent growth, passing through a stage of centralisation, leading again to one of decentralisation.

The Indian Empire may be regarded under the aspect of a vast Federal State. The original three provinces of Madras, Bombay and Bengal were at first mutually independent and were co-ordinate in power. The Acts of Parliament of 1773, 1799, 1833 gradually made the Presidency of Bengal more prominent and placed the other two under the control of its Governor who thus became the Governor-General of India. Throughout the period of conquest, the Central Government increased in authority and although this centralisation was often criticised, (John Bright's speech August 1, 1859) it was not till 1870 that a movement in the opposite direction was begun. From the Governorship of Lord Mayo down to the present time, the move has been to strengthen the administrative powers of the provinces.[2] Later the move in that direction was faster and the Act of 1925 has unequivocally stated that it is establishing Provincial Autonomy. So the provinces as they are now before the inauguration of Federation, do not possess even autonomy in any matter and it is a mockery to think of them as 'Sovereign States' capable of agreeing to or contracting with others for a common cause or for a political union.

The significance of the above remark may be seen from the discussions which the eminent constitution lawyer of India Sir Tej Bahadur Sapru raised in the Federal Structure Committee on the Preliminary Report. He tried to substitute the words 'the Federated Provinces of British India' and stated em-

2 *Colonial Government*—Paul S. Reinsch, Prof. of Political Science. Wisconsin University, p. 256.

phatically that Their Highnesses of Indian States wanted to federate with *a new India* which will consist of Federated Provinces and that I believe was also of the view of my friends over there. He also further reiterated 'the provinces as they are, are entirely out of the question. The Provinces must be federated and the Indian States must be federated.[3] My point is this if you have the word Provinces without the word 'Federated' then it means that each single Province might federate and in principle I am absolutely opposed to that. *The Provinces have to be federated*, if my friends want them from their point of view, *to be sovereign provinces* otherwise they defeat their own object" Mr. Jinnah also adopted the view that 'until the provinces are federated they cannot be component elements.'

"Federating Provinces of British India" was the phraseology finally agreed upon, but the Act now contains the old 'Governor's Provinces' (conclusion of the Sub-Committee).

The other party to the Federation presents another type altogether. The Indian States have survived so far as separate entities. Many of them have treaty relationship with the British Crown. Regarding internal management, the State Raj is supreme but their outside relations are not extensive at all. They have no "separate-entity-relationship" regarding foreign affairs which are entirely in the hands of the Government of India. The character of the sovereignty has been defined by the Government of India once thus [3(a)] 'The principles of International Law have no bearing upon the relations between the Government of India as representing the Queen Empress on the one hand and *The Native States under the sovereignty of Her Majesty* on the other. The *paramount supremacy* of the *former presupposes and implies the subordination of the later.*

To call the States our 'Indian Protectorate' as Sir Louis Tupper has done, may not be satisfactory as it reminds people of

3 Federal Structure Committee Proceedings, p. 205,

3a Resolution of the Government of India No. 1700F-Aug, 21, 1891.

the semi-civilised regions in the African Continent under British control or influence.

To call them again 'Feudatory States' is to import a notion of territorial relationship which existed in the Europe of the middle ages, to which the position of the protected princes does not afford a parallel. The best thing is to understand the various ties that unite and the diverse circumstances that separate these states in the general scheme of Indian Constitution [4] Sir Courtney Ibert is of opinion that all the States character cannot be generally stated but it has to be considered and stated with reference to particular States as based upon and deducible from the treaty, engagement or sannad available.[5] The distribution of sovereignty is a question of fact and it can be collected from the defacto relations of those States with the British Government from the course of actions followed so far. One thing is clear. The character of the relationship defies all known definitions or language of political parlance. All characteristics of internal sovereignty are possessed by the Indian Major States. They have their Legislature, Executive and Judicature, probably better managed and more efficiently equipped than their parallels in British India. Within the Indian State, the Ruler is supreme and he is the source of all power for good or for evil. The Legislature, the Executive, and sometimes even the Executive owe their existence to the Ruler and they cannot be imagined as arising out of any constitution. By one stroke he can demolish old and create new functionaries. The person of the Indian Ruler is the essential factor in a state as far as internal affairs go.

But the functions of external defence, of military organization and of foreign relations lie beyond the Scope of State Partial Sovereignity. This curious admixture of sovereignity in internal matters with want of it in external relationship has been termed a

4 *Indian Constitution*—A Rengaswami Iyengar, p, 226.

5 *Government of India*—Sir C. Ilbert.

'semi-sovereign' by Sir William Lee-Warner.[6] He would purposely avoid using the phrase "self-governing units".

Are the Indian States independent at all? The British Indian Government interferes with the Indian State when there is gross misrule. The depositions, annexations, regency rule are all illustrations of the exercise of this power. Then the relationship is considered as one of a subordinate power owing an explanation to a superior regarding the former's conduct. If one disobeys, it is not termed as an act of war but one of disloyalty or rebellion. So even the internal sovereignity is a conditional one, based upon good behaviour of the Princes and the paramount power being satisfied with it. It is not the province here to discuss how this arose, enough it is for us to consider the present real legal and constitutional status of the state as a party to federate. A sober and great constitutional lawyer of India pathetically writes:-whatever encroachments on the rights and privileges there may have been in the past, have been made not by the people of British India or by any Government responsible to them but by the irresponsible and bureaucratic Government of India. If their rights have been ground down and become attenuated it is due to the British Steam roller driven by the Political Department of India under the orders of successive Viceroys.[7] A still more moving picture of their servility is given by Chailley 'the political officers who reside at their (States) courts are their master. This may not be true in the case of the Nizam who has eleven million subjects nor perhaps in the State of Mysore with its five millions; the opposition of rulers of this calibre might be inconvenient and they consequently escape from the annoying control of the political despot. But elsewhere, the attitude of the political officer is while ordinarily deferential in form, though even that is sometimes lacking, is the attitude of a servant who directs his nominal master, haughty, polite and impertinent and ironical. And what say the observers I am quoting, 'are these political officers save spies whose words will be believed by the English in the face of all outside denial.

6 Sir Lee-Warner—*Native States of India*. 1910, Macmillan.

7 *Indian Constitutional Problems*—Sir P. S, Sivaswamy Iyer, p. 200.

Once they have pronounced judgment on any matter, how can the chief appeal against it . . The peoples of the States are not deceived. They know their *rulers are thus subject to masters* and their attitude takes colour from this.[8] Other officers beyond the political agents have not been free either, from any blemish of this type. They have translated the paramountcy to an imperialistic tone. The relations have been gradually changed. They have been imperceptibly shifted from an international to an Imperial basis, the process has been veiled by the prudence of the statesmen, the conservatism of the lawyers and the prevalence of certain theories about sovereignity.[9] Sydenham of Cambe struck the same note of Imperialism when he wrote 'the Native States of India form a great group of semi-independent communities to which history supplies no parallel . . . When the phase of 'subordinate isolation' ended with the Great Indian Mutiny Lord Canning announced justly 'the Crown of England stands forth as the unquestioned *ruler* of *All* India'.[10]

In the face of the opinions of these non-state authorities, it will be better to consider some of the views of the protagonists of State-Sovereign view.

His Highness The Maharajah of Bikaner stated before the Federal Structure Committee thus—The Princes are entering into this discussion with an open mind . . Our willingness to consider Federation is subject to two essential and broad conditions

a. that India retains the British connection as an equal partner in the British Commonwealth of Nations.

b. that an equitable agreement is reached between all the parties concerned to govern relations of

8 Chailley *Problems of British India*, p. 259.

9 Westlake's *Chapters on the Principles of International Law.*

10 The *Nineteenth Century and After*—p. 831, 1927 Vol.

two Indias—ensuring for the States their due position in the future constitution as co-equal partners with British India, guaranteeing their treaties and internal sovereignty and safeguarding their interests including those of their subjects on terms just and honourable alike to States and British India.

The States lay emphasis on the importance of their being co-equal partners. *They could not* accept any *position of slightest subordination or inferiority to British India.* The States wish to secure the *fullest freedom in their own affairs and to retain or—in cases* of some arbitrary decisions by agents of the *Crown—to regain their Sovereignty* and *internal autonomy* as implied by treaties, sanads and other engagements . . . The Princes do not want to be levelled down from their present position of *internal sovereignty.* If it is desirable and feasible to level up others, we shall be delighted but we do not want to go down. British India if I may say so with all respect has everything to gain but the States are losing their sovereignty and are willingly surrendering it in certain respects.[10a]

Another line of reasoning was adopted by **Sir Akbar Hydari**: 'We the Indian States and the Provinces have decided to co-operate with each other and build up a structure of a greater and united India.—What I should like to do is first of all to start with the Federal Legislature and see *how we all fit into that Federal Legislature.* [10a] But **Sir C. P. Ramaswamy Iyer** immediately answered him 'Sir Akbar Hydari said that the federation ought *not* to be conceived of as if the Indian States were coming into a British Indian Legislature. That is not the view at all.[10b]

Mr. M.R. Jayakar[10c]—The analogy between the Indian Princes and the Sovereign is a dangerous

10a Federal Structure Committee Proceedings, p. 10—12.

10b Page 16, F. S. Committee Proceedings.

10c Page 84. Do.

analogy and I wish even at this stage to sound a cautionary note. If the Indian Princes come into the Federation *on a footing of sovereign or quasi-sovereign rights,* that must not be the basis later on for asking for analogous rights for the Provinces . . *at the present moment the Indian States are Sovereign States,* their subjects are not British subjects, they owe a certain dynastic allegiance to the Crown but they cannot be said to be anything else than Sovereign States within certain limits. They come into the Federation on an entirely different basis from that on which the Provinces come in. The Provinces at the moment are not sovereign though they may be made so by the Scheme of Federation and any attempt to put the Provinces and the Indian States on the same footing or any argument based on the analogy of the Indian States for sovereignty for the Provinces, would be very unwise.

H.H. The Nawab of Bhopal:—Our claim for weightage which His Highness of Bikaner made yesterday was based entirely on other grounds. Such as for instance as our historical importance, our past connections with the Mogul Empire and our present connections with the Crown and *the question of our independent States in the political life of India.* . . We will only federate with a federated British India and not with British India *(as it is at present)* as one solid unit [10e]

An orthodox constitutionalist will smile over this attempt to federate two types of constitutions, neither of which satisfies the

10d F. S. C. Proceedings Page 41.
10e Do. Page 46.

definition of a sovereign state. It is a bold experiment. It may be even loose thinking of constitutional principles. Sir Sivaswamy Iyer remarked 'there is a vast amount of loose and confused thinking upon the subject of federation and the word is indiscriminately applied not merely to organizations which are truly federal but to every form of political organization in which there is a formal demarcation between a Central Government and the Constituent Provinces'[11] What would have irritated the orthodox constitutionalists has now passed the stage of a mere nomenclature and a Federal Constitution of India with two constituent units—one possessing no sovereignty and the other some attributes of it—is to work shortly!

The Joint Committee on Indian Constitutional Reform did not altogether forget the lame and blunt nature of the instruments in their hands. They wanted to get over it by a legal clothing with a still more legal technicality of a 'resumption and redistribution of powers' after Federation. They stated 'that it is clear that in any new constitution in which autonomous Provinces are to be federally united under the Crown, not only can the provinces no longer derive their powers and authority from *devolution of the Central Government* but the Central Government cannot continue to be an *Agent of the Secretary of State.* Both must derive their powers and authority from a direct grant by the Crown. We apprehend therefore that the legal basis of a reconstituted Government of India must be first the resumption into its hands of all rights, authority and jurisdiction in and over the territories of British India, whether they are at present vested in the Secretary of State, the Governor General in Council or in the Provincial Governments and Administration, and second their redistribution in such manner as the Act may prescribe between the Central Government on the one hand and the Provinces on the other. *A Federation of which the British Indian Provinces* are the constituent units *will thereby be brought into existence.*[12]

11 *The Indian Constitutional Problems,* p. 221

12 *Report of the Joint Committee on Indian Constitutional Reform* Vol. I Part I Report p. 86.

When and how these recommendations regarding resumption and redistribution of powers are going to be acted upon have not been made clear in the Constitution. Unless both are done simultaneously ,such a thing is not possible and if anything is done with an interval, the legality of several acts would be subject to serious question and may probably lead to a constitutional deadlock. The framers of the Act have possibly thought of 'a Proclamation of the Federation of India' as a safe constitutional expedient and that proclamation creates the constitution.

This proclamation is a final act so far as the British India is concerned. Regarding the Indian States, a bilateral act is necessary. An Instrument of Accession will have to be agreed to by the State and His Majesty. After this is done, the Provinces, and the States will form the Federal whole.

Do the federating units contract towards the formation of a federation ? Sec. 5 of the Act does *not* provide for an agreement between the Governors' Provinces and the Indian States to form a Federation. This feature, absence of a contract *between* the federating units *as such* is again another novel phenomenon in federal constitutions of the world. The Instrument of Accession may form the basis of future relationship between British India and Indian India and it has to be accepted *by His Majesty* as per Sec. 6 *(4)*. and *not by the Governors' Provinces* with which they are to co-operate or federate, as per the wording of the Act. In fact their consent or agreement is not asked for, nor is it necessary.

To put it more bluntly, it is a case of a Federation being created of two elements, by a third party between two parties, one of which is a limb and a new creation of that third party, the other agreeing with that third party to federate. It is a case of a too—centralised federation, unknown to constitution, queer in its creation, strange in its composition and startling in its formation. It is a challenge to the orthodox view, a negation of accepted principles and notions of federation,a subversion of the sovereignty of the State and Nation and what is more,it names a mixture of these two elements a Federation. It

looks as though it is a travesty, an outrage on our constitutional and political conscience to accept it as a Federation. A really Sovereign State, we have seen, dwindles into a *semi-sovereign* by several historical circumstances and political contingencies! Why should not the word 'federation' grow more elastic to include within it constitutions which are (or are not even) a semblance of a sovereign? None is going to be deceived by nomenclature. British Democracies continue in spite of their monarchs, Italian absolutism rules despite Emperors, Republics are said to reign when only Dictators hold the sway! Persons will have to understand "Federation of India" in a new sense we have to give to the word Federation. All Federations do not agree in their essentials and India strikes a new path perforce,—because of its tradition and political evolution!

The phrase 'Federal Court of India' or 'the Indian Federal Court' should naturally be viewed and understood in the light of the above constitutional features—anomalies and surprises. If we concede that the union is a real federation—in any sense, orthodox or modern (I shall not say unorthodox)—a court established to meet federal wants, federal conflicts and federal causes, may be called a Federal Court. No more apology is necessary for this name and the Court is the tribunal for the Federation as prescribed in the Act.

CHAPTER II.

WHY A FEDERAL COURT?

Is a Federal Court necessary at all, what is the peculiar necessity for it, is it essential for a Federal constitutional structure?

A Federal Court is an essential element in a Federal Constitution. It is at once the *interpreter* and *guardian of the constitution* and a *tribunal* for the determination of disputes *between the constituent units* of the Federation. The establishment of a Federal Court is a part of the White Paper Scheme.[14]

The British India has been having treaty relations with Indian India (Indian States) so far. Were there not conflicts between them? Was there a tribunal for settlement? If any, why create another?—these are the involuntary questions, that arise. These lead again to the great anomaly in the constitutional development, abhorrent to the British tradition and constitution.

There has been no independent Judicial machinery to adjudicate upon inter-statal rights and to prevent the invasion by the Central Government of the domain of State Sovereignty. At the present time, *all questions of this nature are decided by the Government of India in virtue of its claim of paramountcy*,[15] which is itself an *assertion*, not controverted. There has been no clear definition of paramountcy-rights anywhere stated or granted under any treaty. Owing to a variety of causes, due to the changes of conditions brought about in the course of time, by the necessity for the adoption of the old relations to new circumstances and by the

14 *Report by the Joint Committee* Vol. I part 1 Report p. 193.

15 *Federal India*—Haksar and Pannikar. p. 36.

process of logical deductions from the treaties and interpretations thereof, a *tradition* has been established of interfering in the internal affairs of the states in certain classes of cases. Though the Princes contend with considerable force of logic that their treaties should be enforced in the letter and *not in the light of subsequent practice, precedent or usage*, it is too late in the day to go back upon the relations which have become now established and revert to the conditions existing at the time of treaties [16]. The above statements of Sir Sivaswami Iyer put beyond all doubt. that the tradition of a constant constitutional trespass of state rights has created a title to interfere, that perpetual illegal interferences have paved the way for an apparently valid interference, though not sanctioned by the treaty or by any rule of international law and that these very facts which have no legal warrant have established a claim for paramountcy in the British Crown over Indian States. It may be a commentary on the false modesty of the States which led them to adopt an attitude of submission or it might have been due to a passive involuntary acquiescence due to the inevitable internal conditions within them. In any case, law has flown out from 'non-law', a right, out of long usurpation, and an 'adverse' claim out of repeated trespasses! Around these, constitutional conventions and traditions have grown up and no Government is likely to lose or surrender the advantages gained so far. Lord Chelmsford had to concede that the position was *arbitrary* but finds his solace in the fact that the action was *benevolent*. — There is no doubt that with the growth of the new conditions and unifications of India under the British power, political doctrines have constantly developed. In the case of territorial jurisdiction, railway and telegraph construction, limitation of armaments, coinage, currency and opium policy and the administration of cantonments, to give some of the more salient instances — *the relations between the States and the Home Government have been changed*. The changes however have come about in the interests of India as a whole. *We cannot deny however that the treaty position has been affected and*

16. *Indian Constitutional Problems.* Sir P. S. Sivaswami Iyer 205, 206.

that a body of usages in some cases arbitrary but always benevolent has come into being [17].

Lord Reading in his final reply to the Ruler of Hyderabad State, went a step further and put forward a claim—novel and original—on the controversy about the retrocession of the Berars[18]. It looks as though it was a definite declaration of the constitutional sovereign-superiority of the British Crown—no way unassailable, unquestionable or supreme. What began as a hesitating touch has during course of time developed courage to evolve into a sudden push-out, what commenced as an apologetic phase has bloomed beyond all proportions with a title in the supplicant and negation of rights in the giver! The constitutional clock cannot be set back; what rights and what adjustments have taken place as per previous acts cannot now be erased out of existence without considerable disturbance and distemper. It may lead somewhere or nowhere. It surprises me that even a stern constitutionalist like Sir Sivaswami Iyer should say 'that in cases of disputed succession the place of the British Government as the arbiter *must* be conceded', though he would demur to the proposition that the recognition of the paramount power is necessary to a valid title. Why and on what basis he pleads for conceding the said right is not known? If it is only based upon previous interferences, it is but right that the Instrument of Accession under the New Reforms definitely defines and assigns a proper place or negatives it. Hereafter an undefined move in a vague atmosphere of questioned and questionable theories in relations between Indian States and British India ought to be avoided so that a proper adjudication of any right that is questioned by either may be decided by a proper tribunal.

Hitherto all that was regarded by the States as an encroachment on their rights was done in the name of paramountcy. This creates a need for a competent judicial machinery, and it alone can

17. *Lord Chelmsford Speeches.* Vol. II 278.

18 *Gazette of India,* Extraordinary April 5, 1926.

dispense justice and lead to the contentment of the States. The latter, have been always agitating for a (Supreme) Court and the history of the relations between the States and the Government of India during the last seventy years is a conclusive argument in favour of their demand [19].

Other official statements too assert the *judicial* outhority of the British Government to decide disputes in which British India itself is a party. 'In making its arrangements with Native states in this Bombay Presidency, the British Government has acted in virtue of its powers as a *paramount authority* and the *states were bound to accept its decisions.* Upon a full review of the case, the Government of India have come to the conclusion that for *imperial* reasons which apply throughout India, it is necessary that Durbar should comply with the wishes of the Government. His Honour *must* therefore ask the Durbar *to carry out* the request.' Is this not a curious request, which is a command? Any constitutional basis for it ?

The constitutional inferiority-position of the Indian States in a matter of conflict with British India, is one of a serious menace to their independant growth. Even the best of impartial judgments of British India in a dispute between it and an Indian State can only be a veiled executive fiat, another way of enforcing the British Government's will. It is a case of a party being a judge in its own cause. Any constitutionalist will easily grant that the position is neither graceful to the State nor to British India. An impartial tribunal is a necessity, in fact a solution long over due—long-overdue even before the Federal Political Structure was thought of. It will at least assuage the troubled feelings pent up so long and it may lead to a judicial contentment hereafter, if a Federal tribunal is established.

There are other important factors too which press us to think of a Federal tribunal on general grounds. When the loosely

19. *Federal India*—By Haksar and Pannikar.

confederated states unite themselves into a *nation*, national tribunal is felt to be a necessary part of the national government. Under the confederations there exists no means of enforcing the treaties made because the courts of several states owe no duty to that federation and have little to do with it.

Now that Federal Legislature has to be established whose laws are to affect directly the individual citizen, a Federal Judicature is *evidently needed to interpret and apply these laws* and to compel obedience to them. The alternative would be to entrust the enforcement of the laws to the State Courts.

But State Courts are *not fitted to deal with matters of quasi-international character such as admiralty jurisdiction and rights under treaties.* They supply no means for deciding disputes between different states. *They cannot be trusted to do complete justice between their* own citizens and those of another State.

Being under the control of their own Governments, they may be forced to disregard any Federal law which the State may disapprove or even if they admit its *authority, may fail in the zeal or the power to give due effect to it.*

Being authorities co-ordinate with and independent of one another, with no common court of appeal placed over them to correct their errors or harmonise their views, they are likely to interpret the Federal Constitution in different senses and make the law uncertain by the variety of their decisions. To enforce the supremacy of the national federal constitution and national laws over all state laws it was necessary to place the former under the guardianship of the national judiciary [20].

A Federal government stands in greater need of support from judicial institutions than any other as it is naturally weak and exposed to formidable opposition The reason is that

20. *The American Commonwealth* by Bryce P, 229.

confederations have usually been framed by independent states which entertained no real intention of obeying the central government and which very readily ceded the right of command to the federal executive and very prudently reserved the right of non-compliance to themselves! So the union *required a national judiciary to enforce the obedience* of the citizens to the laws and to repel the attacks which might be directed against them. Which is the body that should be that judicial institution ?.

State Courts cannot be given this place. To entrust the execution of federal laws to institutions in the State would be to allow foreign judges to preside over the nation. Again, not only is each state foreign to the Union at large but it is in perpetual opposition to the common interest, since whatever authority the Union loses, turns to the advantage of the States... To enforce *the laws of the Union by means of the tribunals of the States would be to allow not only foreign but partial judges* to preside over the nation.

Again if State Courts are to be given the jurisdiction, it would mean that fundamental laws would be subject to as many interpretation as there are Courts. To suppose that a State can subsist when its laws are subject to so many different interpretations is to advance a proposition, alike contrary to reason and experience.

It was also necessary to create an arbiter in disputes between a superior Court of a State and that of the Union or Federation. It was impossible to get or achieve. It was therefore necessary to allow one of these Courts to judge its own cause and to take or retain cognizance of the point which was contested. To grant this privilege to the different Courts of the States would have been to destroy the sovereignty of the Union *defacto* after having established it *dejure* So the object of the creation of a Federation tribunal was to prevent the Courts of the States from deciding questions affecting the national interests in their own

department and to form a uniform body of jurisprudence for the interpretation of the laws of the Union [21].

In India there had been a conflict of interests between the Government of India and Indian States. But the decisions were by the Paramount power and they were always influenced by extraneous considerations, not relevant to the issue on hand — financial interest of British India, eg. cases of Kathiawad Post.

The establishment of a Tribunal for federal purposes is a sequel to the establishment of the federation. It cannot be avoided and it is a compelling necessity for the growth and safety of the new structure. It alone can create a prestige and it alone will add status to the Indian political structure in the constitutions of the world. *Judicial umpiring in constitutional issues is the essence of Federalism.*

A federation without a federal tribunal will be a startling situation. It will be as unhappy as the present situation wherein the Princes do not realise their position and the British India exercises acts of paramountcy denying the former's right of getting justice from an impartial tribunal.

The new act creates the tribunal and sets aright the apparent unconstitutionality, adding proper links wherever necessary. It is not really so literally true nor so slight an improvement as Mr. K. M. Pannikar thinks—a federal constitution for India would involve the *formal ratification* of existing conditions necessarily accompanied by *creation of appropriate institutions*[22]. It implies much more. Creation of institutions has to be followed by creation or distribution of powers, for or among the institutions created. A cursory reading of the proceedings of the Federal Structure Committee will make us understand that the creation of the institution is a far less task than that of

21. *Democracy in America.* By De. Tocqueville Vol I 130.

22. *Federal India.* Haksar and Pannikar P. 41.

the allocation of powers and duties. It is not a case of a mere ratification, but one of great adjustment.

The place and importance of a Federal Court in the New Constitution cannot be gainsaid. But its utility, power and influence are matters of the future, based upon the tradition it will establish, upon the sense it will show, discretion and impartiality which they will exercise. Federal Court is new to India, and federal decisions have to be given hereafter. Great responsibility lies on the first judges to evolve a system consistent with the dignity, culture and wisdom of this country.

CHAPTER III.

COMPOSITION OF THE FEDERAL COURT.

Number.

The Federal court will be composed of one Chief Justice who will be called " Chief Justice of India " and such number of other judges as His Majesty may deem necessary. The number of judges may be *below* six but if an increase above six is necessary, an address should be presented to His Majesty praying for an increase. It is clear, that the ' number ' contemplated does not include the ' Chief Justice ' (so far as the subsection of S. 200 is concerned) as the number specifically refers to ' puisne judges '-

The intention of the framers of the Act is that there should be some puisne judges along with the Chief Justice. But the drafting has not been definite. Is it not open to His Majesty to say that other judges are not deemed necessary and there is no necessity for appointing other judges? It can be argued that there ought to be puisne judges but the *number* has been left to the discretion of His Majesty. What does a ' number ' mean? Will it not include a number below ' one '? The other argument that may be advanced is that the existence of a Chief Justice will mean impliedly other judges sitting along with him. Here again the wording of the Act is in a different way—" there shall be a Federal Court consisting of a *Chief Justice of India* and such number of other judges as His Majesty may deem necessary." It is *not* a case of a " Federal Court consisting of judges or such number as His Majesty may deem necessary, *of whom* one

shall be a Chief Justice of India". The Act contemplates a person being appointed as the Chief Justice of India *direct*, which appointment makes him a judge of the Court also. Again to weave out an argument from the phrase Chief Justice is not also unassailable. The designation of "Chief Justice of India" might have been given in contra-distinction with the Chief Justices of several courts of Governors' Provinces or State High Courts.

That the question is not free from doubt or ambiguous interpretation is seen from the pointed wording of the Australian Constitution Act on this matter. 'The High Court (eg. Federal Supreme Court) shall consist of a Chief Justice and so many other Justices *not less than two*, as the Parliament prescribes.'

The Joint Committee on the Constitutional Reforms reported about the *maximum* number being specified in the Act but did not feel called upon to fix up a *minimum*. They gave out as their opinion that it would not be necessary to appoint more than three or four [23]. However, Sec. 214 (2) makes it clear that *no case shall be decided by less than three judges* which makes the appointment of two puisne judges at least, necessary.

Increase in the number.

Six has been put down as the maximum, of course to be got after a certain procedure. Until the number reaches six, appointments can be made, if there is a demand for more, the Federal Legislature will have to move by means of a presentation of an address to the Governor-General for submission to His Majesty. If His Majesty feels convinced of the necessity of the demand, he will accord sanction by making the required number of appointments or such number as he deems necessary.

In the Australian Act, the Parliament is given the power to decide the number and the maximum is not fixed. But in India, the Federal Legislature has no power to fix the number, a matter

23. *J. P. C. Report* Page 193, para 323.

exclusively of Federal concern. While the elementary power of deciding a number has been denied to a Federal Legislature, one fails to see the benefit of the constitutional circumlocutory procedure prescribed for getting an increase. It would have been in line with the spirit of the constitution to have allowed the Federal Legislature to decide the number, leaving to His Majesty to approve or disapprove it later.

There is probably another unexpected restriction imposed on the royal prerogative and power, to increase the number above six, if His Majesty is convinced *independently* that there is a case for it. Unless and until the address above referred to is presented, the number of puisne judges *shall not* exceed six. Viewed for this point, the Federal Legislature has a control even over the Crown in a limited way.

Appointment.

The power of appointments vests with His Majesty—not even with 'Majesty in Council', or in consultation with any authority. It may be that recommendations may be called for as His Majesty may not know the respective qualities of the eligible gentlemen for the office. But constitutionally he is not bound to call for nominations and he is not obliged or even expected to accept the recommendation. He has unfettered choice in the matter. The appointment shall be by warrants under the Royal Sign Manual indicative of the origin from which the appointment proceeds.

Age of a Judge.

The Federal Judges shall hold office until they *attain* sixty-five years. Completion of 65 disqualifies a person for the office. In Australia they hold the office for life and there is no age restriction. Views on this matter are bound to differ. The figure 65 was the recommendation of the Joint Parliamentary Committee Report.[24] The North America Act also does not have

24. J. P. C. Report P. 193.

an age-bar for continuance in the office of judge. The argument against age-bar has been most tellingly expressed in the *Federalist*.[25] 'The constitution has taken a particular age as the criterion of inability. It states no one can be a judge after that age. In a state where fortunes are not affluent (truly applicable to India).....the retirement of men from stations in which they have served their country long and usefully on which they depend for subsistence and from which it will be too late to resort to any other occupation for a livelihood ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench.'

The only palliative answer with which one can console oneself is that the average age of the modern Indian is not any where near 65 and if he lives to that good old age, he may thank his stars! But as a piece of a constitutional restriction, it is better that the age-bar is removed especially when the India Act has rightly or wrongly put in "informity in mind or body" as one of the reasons which may prompt the Judicial Committee to recommend the removal of a judge on a reference by His Majesty. Age need not be penalised while senility may be.

Judge's Resignation

A Judge may resign his job by sending a letter of resignation addressed to the Governor General, though his appointing authority is His Majesty. If the judge who resigns happens to be the Chief Justice, the Governor General can make immediate arrangements pending ratification or fresh appointment by His Majesty (under Sec. 202). Hence, to see that the business of the court does not suffer, resignations have been directed to be sent to the Governer General who may immediately look to the arrangements.

When does the resignation take effect? Is it as soon as he has addressed or sent a letter by post or is he to continue as

25. *Federalist* No. L. XPVIII.

a judge till his resignation is accepted? The question is full of significance and of judicial and constitutional importance. If the first view is right, *ie.* he ceases to be a judge as soon as he had addressed a letter, can he sit a moment more on the seat? What is the legality of any proceeding if he does so, and what is the effect of his judgment? Is it to prevail or is it void?

I hope rules will be framed in pursuance of this Act and the matter will be made clear in them.

Removal of a Judge

In the British North America Act, the Judges are to hold office *during good behaviour*. The Australian Constitution Act makes 'proved misbehaviour' or 'incapacity' as grounds for removal.

(i) *Ground of misbehaviour* — 'Between holding office during good behaviour' and losing it out of proved misbehaviour, there is a lot of difference, though in essence the result is the same. To enquire into the conduct of a judge and have his misbehaviour *proved* are very difficult and below decency. The latter is likely to reflect on the Judiciary. The Indian Act has wisely followed the Australian Act in adopting the word 'misbehaviour' but dropping the word 'proved.' Again, want of good behaviour is not synonymous with misbehaviour. Though one may not be of good behaviour, if there is no misbehaviour on his part, there is no judicial danger emanating from him and his presence may be tolerated. But the essence of the judicial system lies with the men who adorn the Courts. Especially in the case of a Federal Judiciary the men should be of the best character and this aspect assumes the greatest importance in an infant Federal Court, like the one on hand. The standard of good behaviour for the continuance in office of the judicial magistracy is one of the most valuable of the modern improvements in the practice of government.

'In a monarchy, it is an excellent barrier to the despotism of the prince, in a republic, it is no less an excellent barrier to the encroachment and oppressions of a representative body. It is the best expedient to obtain a steady, upright and impartial administration of the laws'.

The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The Executive not only dispenses the honours but holds the sway of the community. The Judiciary has no influence over either the sword or the purse.....It may be truly said to have neither force nor will, but merely judgment and must ultimately depend upon the Executive for the exercise and efficacy of its judgments.....

From the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, overawed and influenced by its co-ordinate branches. So, nothing can contribute to its firmness and independence or permanency in office,—qualities which may be regarded as indispensable ingredients in its constitution and in a great measure as the citadel of the public justice and public tranquility.

This independence is peculiarly essential in a Federal Limited Constitution, with reservation of particular rights and privileges. These will be preserved in practice by the Courts of Justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution as void. Cases of misbehaviour are bound to be rare. Even in such a case, to make the judiciary supreme, and to see that the party factions in India do not influence the final verdict on the matter, the Judicial Committee of the Privy Council has been charged with the task of reporting on the matter on a reference by His Majesty. That ensures the safety of the honest judges who deal justice without fear or favour, who may even incur political (temporary) unpopularity by their judgments and whose decisions may even provoke party leaders on either side, why even States, the members of the Federation. The report by the

Privy Council should be to the effect that a particular judge, because of one of the reasons, *ought* to be removed. Any halting recommendation will not avail. A bold recommendation can be possible only when the Judicial Committee is most emphatically convinced of the fact of misbehaviour. Even the judge in question, if he is ousted, may have the satisfaction that he was properly tried and tried by the highest tribunal in the Empire and it found against him. Such cases will never occur; that shows the great permanence of the judiciary and the absolutely safe security of their tenure, if only there is no moral dirt about them.

'Judical misbehaviour' in this section refers only to corruption and not exhibitions of temper or use of hot language or even insolent treatment of the Bar.

Infirmity of Mind:—This has been put as one of the grounds for a removal, only after a similar process of a Privy Council report. There is a section of Constitutionalists who feel that the immunity of judges almost tends to excess and a difficulty arises occasionally when a judge becomes unfit and does not himself recognise the painful truth[27]. The Australian Act has put the word 'incapacity'. The India Act is more rigorous. The disqualification has been extended to infirmity. A judge may be slightly infirm yet he may be capable. 'Fame is the last *infirmity* of *noble minds*'. Is it a disqualification? So infirmity of mind has obviously a reference to loss of mental and intellectual vigour to understand and decide cases of vital importance to States and Nations. Insanity, obstructive and irresponsive morbidity, continued epilepsy, leading to an intellectual paralysis are obviously implied in these.

Infirmity of Body:—Every infirmity of body is not likely to disqualify a judge. A motor accident may leave a judge one hand or one leg less. Another may be chronically weak and may not be able enough to have long sittings. Do these constitute infirmity of

26. Federalist No. LXVIII — Hamilton
27. *Working Constitution of the United Kingdom*—By Leonard Courtney

body? No. Any physical disability of such magnitude to make him absolutely unfit for the task of a judge is contemplated. A paralytic can never be a judge. A dumb or blind Judge—became dumb or blind after he was made a judge—cannot pull on.

One can be sure that these disqualifications will not be lightly thought of and the Privy Council will see that they have convincing proof of the charges made in this direction before they submit the report. 'They know too well that the mensuration of the faculties of the mind has no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would often give more scope to personal and party attachments and enemities than advance the interest of justice and of public good'.[28] The India Act wanted to make a provision against judge's inability but wisely placed the decision on the matter in the hands of the members of the Privy Council, who are not likely to be influenced by party feelings in India.

Qualifications for Judges

The essential qualifications for the office of a judge are :—

(a) Judgeship of a High Court in British India or in a Federated State.

(b) Barristership of England or Northern Ireland, of at least ten years standing or a membership of the Faculty of Advocates in Scotland of at least ten years standing.

(c) Pleader-ship of at least ten years, of a High Court in British India or a Federated State or two or more such Courts in succession.

The expression 'Pleader' has been defined in the Act to include an 'Advocate.'

28. *Federalist.* No. LXXVIII

A person shall not be qualified for appointment as Chief Justice unless he is or when first appointed to judicial office was a Barrister, a member of the Faculty of Advocates or a Pleader and he should have put in *fifteen* years.

In computing the period of the standing of the above persons, any period which they have spent in holding a judicial office, after they became a Barrister, a member of the Faculty or Pleader, shall be included.

Every Judge shall, before he enters upon his office, make and subscribe on oath according to the form set in No. 4 or 5 of the IV Schedule of this Act.

In other Federal countries such legal qualifications are not insisted upon. There is no constitutional requirement to that effect. Still, none but lawyers are appointed to the United States Bench!

The British North America Act does not provide any qualification as a requisite condition for the office. Nor does the Australia Constitution Act. The Constitution of the Supreme Court of South Africa does not contain any similar condition regarding qualifications for a Judge.[29]

In India Act a distinct good step has been taken to fix up the general and experience qualifications for Judgeship. When vital questions of constitutional importance are likely to come up for decision before the Federal Tribunal, to have a body composed of purely lay men (or lay men *also*) will not be to the advantage or growth of judicial tradition or constitutional machinery which should stand enhanced in prestige by its decisions. There is also another position to be considered. Qualifications have been fixed for the appointments of the High Court Judges in several Provinces and similar provisions are obtainable in Indian State High Courts too. When appeals from such tribunals lie to the

29. *Actual Government* — By Hart

Federal Court, it is hard or even absurd to imagine that an Appellate Tribunal can afford to be less legally equipped than the Lower Courts.

Salary of Judges

His Majesty in Council—not His Majesty solely—has to fix the Judge's salaries and allowances for expenses in respect of equipment and travelling upon first appointment and to such rights in respect of leave and pensions. These may be fixed from time to time. But once they have been fixed at the time of appointment, they shall not be varied to his disadvantage after appointment. This provision leads to the independence and absolute safety of the Judge. After his appointment, he has only to follow the wording of the oath taken by him both in letter and spirit and fear God and none on earth. His position is assured and his salary is guaranteed. Nothing more can he expect, nothing more he needs too. But this does not prevent an increase in his salary if the general economic conditions demand it and if His Majesty in Council resolves upon the same. What might be extravagant today, might half a century later, become penurious and inadequate. It was therefore necessary to leave it to the legislature to vary its provisions in conformity to the variation in circumstances, yet within such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands and he can be never deterred from his duty by the apprehension of being placed in a less eligible situation.

A change for the better in salary is necessary in the case of Judges as their tenure is indefinite, while the case of the President's salary may be different. He is elected only for four years and there is not likely to be a change in prices and circumstances within four years—normally speaking. But in the case of Judges, what would be sufficient at their first appointment would become too small in the progress of their service. This provision for the support of Judges bears every mark of prudence and efficacy and it may be safely affirmed that, together with the permanent

tenure of their offices, it affords a better prospect of their independence, than is discoverable in any of the Constitutions of the States in regard to their own Judges.

Temporary Vacancies—Chief Justiceship

Vacancies, caused by reason of temporary absence or of other reasons, of the Chief Justice will be filled from among the other Judges by the Governor-General in Council and it shall hold good until some person appointed by His Majesty enters on his office. The Governor-General's powers are restricted to filling up *temporary* vacancies.

Seat of the Federal Court

The Federal Court shall sit in Delhi and at such other place or places, if any, as the Chief Justice may, with the approval of the Governor-General from time to time, appoint. Delhi is no doubt the Imperial Capital and is the seat of the Federal Legislatures but whether it can be a good place to house the Federal Court is a debatable point. Without offence to Delhi or to its citizens or to the Delhi Bar, one can say that Delhi cannot be said to possess a legal environment. A Federal Judiciary will no doubt demand an expert Bar in Federal Law. Delhi was never the seat of a High Court and it can never claim to own among the ranks of its Bar, persons of All India eminence, capable of arguing difficult questions of Federal law. Not that Delhi Bar is not capable of rising to the occasion that the above statements are made, but from a Constitutional point, it is far better to establish the Court in a place which can boast of an intelligent and renowned Bar or in a place within the easy reach of all eminent lawyers. There is no great necessity or advantage to have the Federal Court at the Imperial Capital. If it is in a central place in India, suitors will stand to gain in expenditure and renowned lawyers from Provinces can be easily taken to argue the cases. The Act has provided for changes of places of sitting and from experience, the future Chief Justice of India will recommend the Court's transfer to a more convenient place, if necessary.

CHAPTER IV

JURISDICTION OF THE COURT

Details of Work

The Court has two kinds of jurisdiction

1. An Original Jurisdiction
2. An Appellate Jurisdiction in appeals from
 (a) High Courts in British India
 (b) Do. in Indian States (federated)

Original Jurisdiction

Parties

Regarding the original jurisdiction, it is exclusive and it is to the exclusion of any other court in certain matters. Dispute should be between *any two or more* of the following parties—Federation and any of the Provinces or any of the Federated States. So the parties to a dispute may be any of the following sets.

(a) Federation versus an Indian State or States.

(b) Federation versus a Governor's Province or Provinces.

(c) Provinces versus an Indian State or States.

These are certain. Do they include also disputes

(a) between one Federated State and another Federated State.

(b) between one Province and another.

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If we read the *report* of the Joint Committee on Reforms, the matter looks clearer. 'This jurisdiction is to be an exclusive one and in our opinion rightly so, since *it would be altogether inappropriate, if proceedings could be taken by one unit of the Federation against another in the courts of either of them.* For that reason we think *where the parties are units of the Federation* or the Federation itself, the jurisdiction ought to include not only the interpretation of the Constitution Act but also the interpretation of the federal laws by which we mean any *laws enacted by the Federal Legislature'*.[1]

But it should be said that the wording of the Act does not connote the idea of jurisdiction being granted to cases among Federal *units* of the same type—an Indian State versus an Indian State or a Province versus a Province. The section restricts itself to a dispute *between any two* or more of the *following parties.* "It imports the idea of a dispute between the Federation and any Province or a Federated State. I am not quite sure whether the wording of the Act can be said to include State versus State, Province versus Province. The section ought to be cleared up with proper amendments.

The Draft Report of the Chairman of the Joint Parliamentary Committee on Reforms[2] puts the matter beyond doubt. He hopes for the establishment of an Inter-Provincial Council, which is fortunately provided in the Constitution in Section 135.

'We do *not* observe any proposals in the White Paper *dealing with disputes or differences between one Province and another*, other than disputes involving legal issues, for the determination of which the Federal Court is the obvious and necessary forum. Yet it cannot be supposed that Inter-Provincial disputes will never arise, and we have considered whether it would not be desirable to provide some constitutional machinery for dispo-

1 *J. P. C. Report* p. 194, para 324

2 *Chairman's Draft Report J. P. C. Proceedings* Volume I Part II Proceedings, page 111, para 223

sing of them. At the present time the Governor-General in Council has the power to decide questions arising between two provinces in cases where the Provinces concerned fail to arrive at an agreement, in relation to both transferred and reserved subjects; but plainly it would be impossible to vest such a power in the Governor-General or in the Governor-General or Federal Ministry after the establishment of Provincial Autonomy, though we do not doubt that the good offices of both will always be available for the purpose. But after careful consideration we have come to the conclusion that it *would be unwise to include in the new Constitution any permanent machinery* for the settlement of disputes of the sort which we have in mind, and in our opinion the more prudent course will be to leave *the Provinces free to develop such extra-constitutional machinery as the future course of events may show to be desirable.* There will be necessarily many subjects on which Inter-provincial consultation will be necessary, as indeed has proved to be the case even at the present time; and we anticipate that sooner or later, a system of provincial conferences, held at regular intervals will come into existence, as we believe has happened in Canada. Suggestions for a formal Inter-Provincial Council have been made to us, but we do not think that the time is yet ripe for this. The assistance of Parliament may one day be invoked for the purpose of creating such a Council, but we think that this is a matter on which Indian opinion will be better able to form a considered judgment after some experience in the working of the New Constitution.'

Section 75 of the Australian Constitution expressly refers to disputes between residents of different States, or *between a State and a resident of another State*".

Nature of Dispute

(i) *General*

The jurisdiction is granted if and in so far as the dispute involves any question—whether of Law or Fact on which the existence of a legal right depends.

(ii) *State—A Party*

This jurisdiction will not extend to a case in which a State is a party unless the dispute relates to

Interpretation of Act, Order in Council and powers under Instrument of Accession

(a) An interpretation of this Act.

(b) An Order in Council made thereunder.

(c) The extent of the Legislative and Executive authority vested in the Federation by virtue of the Instrument of Accession of that State.

Matters out of an agreement under the Act

(d) A matter arising under an agreement made under Part VI of the Act in relation to the administration in that State, of a law of the Federal Legislature.

(e) Some matter with respect to which the Federal Legislature has power to make laws for that State.

Jurisdiction under an express agreement

(f) Matter arising under an Agreement made after the establishment of the Federation with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relation with the Indian States between that State and the Federation or a Province—the said agreement expressly providing for the extension of jurisdiction to a dispute.

The jurisdiction will *not* extend to any dispute arising under *any* agreement which expressly provides that the said jurisdiction shall *not* extend to such a dispute.

Nature of the Judgment in Original Jurisdiction

The Federal Court in the exercise of its original jurisdiction shall *not* pronounce any judgment other than a declaratory judgment.

Comparison with Other Constitutions

1. The Supreme Court of the *United States* has original jurisdiction only in cases affecting Ambassadors, Public Ministers, Consuls and those in which a State is a party.

2. The High Court of *Australia* has original jurisdiction on the following (Ref. Sec. 75.)

(i) Arising under any Treaty.

(ii) Affecting Consuls or other Representatives of other Countries.

(iii) In which *the Commonwealth or a person suing or being sued on behalf of the Commonwealth, is a party.*

(iv) Between States, between residents of different States, or *between a State and a resident of another State.*

(v) In which, a writ of Mandamus or Prohibition or an injunction is sought against an officer of the Commonwealth.

The Parliament by making laws confer original jurisdiction on the following matters too :—

(vi) On any matter arising under this Constitution or involving its interpretation.

(vii) On any matter arising under any laws of the Parliament (Federal Legislature).

(viii) of admirality and maritime jurisdiction.

(ix) relating to the same subject-matter claimed under the laws of different States

A reading of the above will show us that the Indian Act has *not* made provision.

(i) For a case against the Federal Government by an injured citizen.

(ii) For a dispute between one Federated State and another or between one Province and another —not expressly granted—though the report refers to it.

The Act has *not* also provided for a contingency of the Federal Legislature conferring additional powers of Original Jurisdiction, as it is given in the Australian Act.[3] But it is a matter of gratification that the so-called additional powers of the Australian Constitution Act have appeared as the primary powers of Original Jurisdiction in the India Act. A provision to enlarge the Appellate Powers does however find a place.

The Appellate Jurisdiction

It has two kinds of Jurisdiction. The appeals may be

(1) From decisions of the British India High Courts.

(2) From decisions of the High Courts in Federated States.

The appeals too are not against *all* decisions of the said High Courts. They are of a restrictive character and confined to a few cases.

From British India High Courts

An appeal from a British India High Court will lie only:—

(a) If it involves a substancial question of law.

3 *Federations and Unions in British Empire*—by Egerton p. 213

(b) If that question of law is in relation to the interpretation of this Act or any Order in Council made thereunder.

(c) If the concerned High Court certifies that the case involves a question of law as to the interpretation of this Act or Order in Council as above stated.

A duty is cast upon the High Court in British India.

i. To consider in *every case* whether or not any such question is involved.

ii. and of its own motion to give or withhold a certificate for filing an Appeal.

Grounds of Appeal

They may be that

i. any such question as aforesaid has been wrongly decided.

ii. on any ground on which that party could have appealed without special leave to His Majesty in Council if no certificate has been given—under Sec. 206, the Federal Legislature may provide a categorical list of such cases wherein an appeal may be filed without a certificate.

From High Courts of Federated States

An appeal may lie to the Federal Court from a State High Court under the Federation, on any or all of the following grounds.

(1) on the ground that a question of law has been wrongly decided.

(2) that the question of law concerns the interpretation of this Act or an Order in Council made thereunder.

(3) or it relates to the extent of the Legislative or Executive authority vested in the Federation by virtue of the Instrument of Accession of that State.

(4) or arises under an Agreement made under Part VI of the Act in relation to the administration in that State, of a law of the Federal Legislature.

Form of Appeal

It shall be by way of a special case to be stated for the opinion of the Federal Court by the High Court. The Federal Court may require a case to be so stated and may *return any case so* stated and order *that further facts may be stated* therein.

The form of appeal here differs from the appeal, from judgments of British India High Court. There the party may have to file the appeal. But here the appeal is to be in the form of a statement of a case by the High Court for opinion of the Federal Court. No leave is insisted on. The Federal Court has expressly the right to return a case for an additional statement of facts. So the Appellate Court here deals with facts too. It has to, as cases revolve round treaties and agreements. The extent of the Legislative and Executive authority by virtue of an Instrument of Accession or an Agreement can be only a question of fact and the decision has to be based on facts too.

Appeal from Federal Court Decisions

The Federal Court is not the supreme judicial body even on the matters it decides. An appellate Tribunal is provided ie. His Majesty in Council. In matters of original jurisdiction, the appeal is only the first appeal. In all other cases, leave of the Federal Court or of His Majesty in Council is necessary to file an appeal.

Practice and Procedure in Federal Court

The Federal Court is armed with powers to frame rules for regulating the practice and procedure of the court. They have to be approved by the Governor - General. The rule-making powers extend to, besides other things,

(i) rules as to the persons practising before the court.

(ii) as to the *time* within which appeals to the court are to be entered.

(iii) *costs* of and incidental to any proceeding in the court.

(iv) fees to be charged in respect of proceedings therein.

(v) summary *determination of any appeal* considered by court to be frivolous, vexatious or brought for the purpose of delaying execution of decree passed.

(vi) judges sitting.

(a) rules may fix the number of judges who are to sit for any purpose — it should not be less than three.

(b) rules for the constitution of a Special Division of the Court or Division Benches of the Court.

The Chief Justice

He has got to determine what judges are to constitute a division of the court and what judges are to sit for any purpose. Separate rules of court may be framed for this. The Division of the Court may be as 'Original' and 'Appellate' It may lead to a number of judges specialising in Federal law

and others specialising in State and Provincial laws to decide appeals from State and Provincial Courts.

During Trial—Power of the Court

The Federal Court shall, as regards British India and the Federated States, have power

(1) to make an order for the purpose of securing the attendance of any person.

(2) ... to order discovery or production of any document.

(3) to order for investigation or punishment of any contempt of court which any High Court in British India has power to make as regards the territory within its jurisdiction.

(4) to order costs of and incidental to any proceeding.

Enforcement of the Decrees or Orders of Federal Courts

All authorities civil and judicial, *throughout the Federation* shall act in aid of the Federal Court. All orders passed inclusive of costs passed by a Federal Court shall be enforceable by all courts and authorities in *every part of British India or of any Federated State, as if they were orders duly made by the highest court* exercising civil or criminal jurisdiction, as the case may be, in that part.

These aids are subject to two exceptions. Orders for costs will not be enforced by the above process. It will not apply, as regards a State, to cases that arose out of the enlarged appellate jurisdiction contemplated under the Act (Sec. 206)

Judgments

They shall be delivered in open court and with the concurrence of the majority of the judges present at the hearing of the case. But a judge is entitled to deliver a dissenting judgment.

Hearing of Cases

The method of court in other Federal Courts is to hear arguments and receive printed briefs; the judges then compare views and the Chief Justice designates some judge to prepare a written opinion. That is later on submitted and discussed. If any members of the court are unable to coincide, they have a right to prepare dissenting opinions. Sometimes there will be one opinion of the court and a single dissenting opinion signed by one, two or three or four Justices. Sometimes, as in *Dred Scott Decision* of 1857 and the singular cases of 1901, almost every Justice states his opinion separately, perhaps expressing different reasons for coming to the same conclusion.[1]

The Federal Court in the exercise of its Original Jurisdiction shall pronounce only a declaratory Judgment.

In the case of Appeals, the practice differs from that of the ordinary courts under the Code of the Civil Procedure. If the appeal is allowed, it will be remitted back to the Lower Court with a declaration as to the judgment, decree or order which is to be substituted for the judgment or order appealed against.

Enforcing Appellate Judgments—Stay Order

The Court from which the appeal was brought shall give effect to the decision of the Federal Court.

The order as to costs as soon as it is written up is transmitted to the Court from which the appeal was brought and that Court shall give effect to the order.

The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to the Court.

1 *Actual Government*—by Hart p. 302.

Letter of Request to the Federated States

The Federal Court shall cause letter of request to be sent to the State concerned for aid of Civil Authorities and the Ruler of the State shall cause such communication to be made to the High Court or to any Judicial or Civil Authority, as the circumstances may require,

(a) when the Federal Court requires a special case to be stated or re-stated,

(b) when a case is remitted to a State Court,

(c) when an order of stay of execution is passed in a case, from a High Court in a Federated State,

(d) when the aid of the Civil or Judicial Authorities in a Federated State is required.

Ancillary Powers to Federal Court

Additional powers to exercise the jurisdiction more effectively may be conferred upon the Federal Court after taking sanction under an Act by a Federal Legislature. These powers are not to be inconsistent with any of the Provisions of this Act.

Saving Clause

The Federal Legislature cannot confer any right of Appeal to a Federal Court in any case in which a High Court in British India is exercising jurisdiction on appeal from a Court, outside British India or as affecting any right of appeal in any such case to His Majesty in Council with or without leave.

The Federal Advocate-General

The qualification for the office of Federal Judge is also the qualification of the Federal Advocate - General. He shall perform all duties of a legal character as may be referred or

assigned to him by the Governor - General. He shall be the General Legal Adviser to the Federal Government. He shall have the right of audience in all Courts in British India and in a case in which Federal interests are concerned, in all Courts in any Federated State.

His salary shall be determined by the Governor-General and he shall hold office during the pleasure of the Governor-General. The power of appointment, dismissal and determination of salary are purely within the individual judgment of the Governor-General.

Court Expenses

The Administration expenses of the Federal Court inclusive of salaries, allowances and pensions payable shall be a charge upon the revenues of the Federation. Any fee or other moneys taken by the Court shall form part of those revenues.

The Governor-General shall exercise his individual judgment as to the amount to be provided for this in the Budget before the Federal Legislature.

Language of the Court—A Court of Record

The language of the Court shall be English and the Federal Court shall be a Court of Record. All the opinions are printed and published in America, in official volumes which are universally considered to be the most authentic statements of the principles of Federal Constitution and they state not only the conclusions but the lines of arguments which led the judges to those conclusions. The publication of the reports is a check upon National and State Courts, since it compels them to take notice of previous decisions on the same issues — hence it is an aid to the stability of the Constitutional Law of the country.[2]

2 *Actual Government* — by Hart p. 302

CHAPTER V

THE FEDERAL COURT— A CONSULTATIVE JUDICIAL BODY

The India Act gives to the Federal Court a function that is seen in some of the Federations, of being a Consultative Body. It enables the Governor-General to obtain the opinion of the Federal Court on a question of law that has arisen or is likely to arise, if he feels that it is of such a nature and of such public importance that it is expedient to have the opinion of the highest Judicial Body.

The Federal Court may consider over the matter after such hearing as they think fit and report to the Governor-General thereon. It should be in accordance with the opinion (majority —concurrence) of the judges present at the hearing of the case. A judge is also entitled to deliver his dissenting judgment if any. The opinions should be delivered in open Court.

The Constitutional Importance of such a Provision in a constitution is not of universal approbation.

The preponderance of opinion among American Lawyers is hostile to the idea of 'advisory opinions' on the ground that the giving of such opinions is not an appropriate Judicial Function. Mr. Elipu Hoot, a member of the Advisory Committee of Jurists which prepared the draft of the statute of the Permanent Court of International Justice characterised the practice as a "violation of all judicial principles". Judge John Bassett Moore, a member of that Court pronounced it to be obviously not a judicial function. But Professor Hudson, an equally eminent authority holds the contrary view. In England the Judicial Committee of the Privy Council discharges this duty. All the Canadian Provinces

have it. The Supreme Court of the Dominion of Canada is charged with this function.

The matter has been exhaustively considered by their Lordships, members of the Privy Council in the celebrated case of *Attorney General for Ontario V. Attorney General for Canada.* 1912 A. C. 571 at 582. The following points were brilliantly summarised against such a duty being cast on the Court.

(1) it is so wide in its terms as to admit of a gross interference with the judicial character of that Court, and that therefore it is of grave prejudice to the right of the Provinces and of the individual citizens. The Court is to give its opinion with reasons.

(2) though no direct result is to ensue from the answer so given and no right or property is thereby to be adjudged yet the indirect result of such a proceeding may be and will be most fatal.

(3) when the opinion of the Highest Court has been given upon matters, both of law and of fact, it is said, it is not in human nature to expect that if the same matter is raised upon a concrete case by an individual litigant before the Supreme Court, its members can divest themselves of their pre-conceived opinions, whereby may ensue, not merely a distrust of their freedom from prepossession but actual injustice, in as much as they will, in fact, however unintentionally, be biassed.

(4) Although the Act in question provides for requiring argument and directing that counsels shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known before-hand and therefore will be prejudiced without so much as an

> opportunity of stating their objections before the Supreme Court has arrived at what will be a determination of their rights."

From a strictly constitutional or even judicial standpoint, nothing serious can be urged against the tenability of the above arguments. After all, Courts and Constitutions are only means to an end — the general contentment of the people. If the general will is for this advisory power being given to the judiciary and if it is likely to enhance the value or the usefulness of the judiciary and also enlarge the happiness of the nation, there need be no serious objection to the same. In fact, Courts exist for the vindication of law and impartiality, leading to the general happiness of the race and not for a mere theoretical display of legal casuistry. The same view was adopted by the members of the Joint Parliamentary Committee. 'We are of opinion that this Advisory Jurisdiction may often prove of *great utility*; we agree that it need not be limited to the Federal Sphere and the right of referring any matter to the Court for an advisory opinion should be in the Governor-General's discretion.'

As stated above, there is a similar power conferred under Sec. 4 of the Judicial Committee Act of 1833. A case of applying for advice recently arose in a matter of International Law in *In Re Piracy Jure Gentium* 1934 A. C. 586=1934 W. N. 171. It held that even a frustrated attempt to commit a piratical robbery is enough to make it *piracy juregentium.*

In India the benefit of such a provision cannot be over-estimated. An American writer says "there is undoubtedly a great deal of dissatisfaction with the administration of the law, among learned members of the legal profession and citizens interested in the matter Legal tradition requires judges to abstain from rendering an opinion respecting the constitutionality or meaning of a law, except when considering an actual law-suit brought before them. As a result, the public in many cases cannot know what is lawful and what is unlawful, without resorting to the extensive

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legal proceedings. Such proceedings are costly, besides being tedious and sometimes well-nigh interminable. Poor persons of moderate means are often unable to obtain justice without a law-suit for which they have no money to pay. Finally it is stated that State Courts often set aside laws by a small margin of majority (among judges), creating uncertainty and dissatisfaction among the people interested in the fate of the measures in question. Al these matters are now vigorously discussed by the Bar Associations and private citizens and out of the analysis of the situation, have arisen a number of constructive remedies.[1]

Recently an Ex-Judge of the Madras High Court [2] lectured on the 'Seamy-side of law' and he most graphically stated the uncertainty of law when he said that "as the lawyer was stating the latest settled opinion on a point to the judges of the Madras High Court, that point might be at the melting pot before the Privy Council and it might be even reversed."

It was good that, in Wisconsin, New York, Florida and Kangas, private citizens are permitted to apply to the Court to find out what the law is on some point or points, without going to the expensive process of a law suit. The Courts are empowered to make 'declaratory judgments' as they are called.

Akin to this, is the practice of allowing the highest Court to give advisory opinions to the Governor and to either branch of the Legislature, as to the constitutionality and general legality of any proposed Act or Law. This system prevails in New Hampshire, Massachusetts, Maine, Rhode Island, Florida and Colarado.

Such an advisory jurisdiction besides settling a point, settles the same in no time. Time is saved and what is more, the opinion of the highest tribunal is got without going through the cir-

1 *American Government and Politics*— by Beard p. 651-652

2 Mr. V. V. Srinivasa Iyengar

cumlocutory process of moving the Court of the first and second instance and doing penance at their gates for several months, if not years, all to get an inconclusive judgment to be appealed against by either party!

In fact the 'advisory nature of jurisdiction' is so good that attempts should be made to see that such a relief is possible to be availed of by the private suitors also and not by the Governor-General alone.

Keith seems obviously to favour this 'advisory jurisdiction' in a Federal Court. He desires that the submission should be only on an important question of law or fact ('fact' does not find a place in the India Act). The submission *ipso facto* makes the matter important and bars any right to deny that it is important. The judgment or answers ('opinion' as per the India Act) to such a question though merely advisory are to be treated as final judgment for the purpose of reference to the Privy Council.[3]

Procedure under the India Act differs from that under the Judicial Committee Act in that the dissenting judgments are not delivered in the Privy Council. The practice of the International Court at Hague is adopted.

3 *Responsible Government in British Dominions*—by Keith Vol. II p. 750

CHAPTER VI

THE RULE OF LAW—JUDICIAL SOVEREIGNTY

What Hart exclaimed about the establishment of Judicial system in American Federation can be equally applied to Indian Federation. 'The establishment of the Judiciary in the Federal Constitution is one of the most striking features of that great work. For the first time in the history of the world, the three departments of Government were thoroughly and co-ordinately organised ; for the first time in the experience of Federal Government, a system of Court was provided, not only for Federal causes but with the right to hear appeals from State Courts and for the first time Courts were authorised to disallow State Law and eventually to assert power over national legislation.[1]

The Constitution Act has provided that the Federal Court has power to decide questions relating to the interpretation of the Act, questions arising under the Act and Orders in Council between a Federated State and the Federation. As the interpreter of the Act, the position of the Federal Court is supreme. It has power to stand between the Constitution and the Legislature and impose its interpretation of the Constitution upon the Legislature.[2]

No legislation contrary to the Constitution can be valid. To deny this would be to affirm that the Deputy is greater than the Principal, the servant is above his master, that the representatives are superior to the people themselves, that men acting by virtue of powers may do not only what their powers do not authorise but what they forbid?

1 *Actual Government*—by Hart p. 297

2 *Political Science and Constitutional Law*—by Burgess Vol. II p. 326

The Interpretation of the Laws is the peculiar and proper Province of the Courts. A Constitution is in fact and must be regarded by the Judges as a Fundamental Law. It belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the Legislative Body. If there should be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred or in other words, the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents.

It does not mean a superiority of the Judicial to the Legislative power. It only supposes that the *power of the people is superior to both* and that where the will of the legislature declared in its statutes stands in opposition to that of the people declared in the Constitution, the Judges ought to be governed by the latter rather than by the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.[3]

The Federal Court is the balance which weighs without fear or favour, the corresponding privileges of the Nation as against the State and of the whole country against the part, of the National welfare against parochial outlook. It does not tone down or erase instinctive lawful particularities in State but it sets its face against those that repel against the accepted ordinary canons of political and constitutional life. Varieties that can come under fundamentals are tolerated but the very reverse of fundamentals are never agreed to.

Court as the Superintendent of the Realm– Judicial Control of Official Discretion

Reliance on law as the outstanding instrument of control over Government has the necessary effect of elevating the Courts into the position of ultimate supremacy. If law is to be effective

3 *Federalist* No. LXXVIII

as a means of control, there must be an agency to supply it and to invalidate or penalise governmental action which runs counter to its precepts. The agency is at hand in Courts. Because of the impossiblity of a complete code of written law supplied to the judges in advance, to dictate their decision in every case in view of the judicial maxim that the law is competent to supply a rule for all controversies which may arise, a wide latitude is necessarily opened to the Court in shaping and developing rules which they will apply to determine the validity of facts of other departments of Government. This judicial supremacy is the corollary of our Anglo American doctrine of the Rule of Law.....Every official from the Prime Minister down to a Collector of Taxes is under the same responsibility for every Act done without legal justification.

Because of this power, it is possible to have the course of administrative policy defined in the final analysis not by administrative officials but by judges themselves. The judges have it in their power to make *themselves, as Coke wished them to be, Superintendents of the Realm.*[4]

Rule of Law—Presumption [5]

The rule of law which raises a presumption of the validity of congressional acts applies only when these acts are subjected to an attack on the ground that they exceed the power of the Federal Government; a clearer statement of the presumption would be that of the validity of the Acts of the Federal Government, whether Legislative, Executive or Judicial.

The operation of a Government with its powers divided up between three co-ordinate branches is impossible.

4 John Dickinson of Princeton University—An article on 'Judicial Control of Official Discretion'. *American Political Science Review, May 1928 p. 278*

5 Dr, Albert Langeluttig of the Chicago Bar—An article on 'An American Government and Politics' in *American Political Science Review*, February p. 61—65, in commenting on the case of *Myers V. United States.*

The outcome is that one of the branches assumes the supremacy.....In America this has been the Judiciary so that our Governments may be called Judiciocracies.

Judges—Law Givers

The Judges are in reality more than judges, they are ultimate Law Givers, Statesmen appointed for life; for whether the Federal Government can Legislate on terms and conditions of labour depends upon how five judges out of nine interpret the Law made reasonably within Federal Competence. The judges have admitted the doctrine "only what is expedient for the community" is the secret root from which law draws all the juice of life and it is their individual ideas of expediency which determine their Judgment on constitutionality"[6]

Necessity of Judges

Where there is no judicial department to interpret and to execute the law, to decide controversies and to enforce right, the government must either perish by its own imbecility or the other departments of Governments must usurp powers for the purpose of commanding obedience to the destruction of liberty.[7]

American Interpretation of Law

Importance of the Judge

'The theory that law is the command of the supreme legislature has never appealed to the American legal philospher for there is no single body in the United States whose commands are ultimate and universal..... The peculiar contribution which the United States has made to political science is the discovery that there can be within the same territory two supreme

6 H. Finer—*Foreign Governments at Work* p. 63—64

7 Kent—*Commentaries* - Lect. XIV

Governments functioning within their own spheres. The legislatures of both the Federal and State Governments have the power to command but the power of one is necessarily limited by the power of the other and in disputed questions it is for the Court to decide which Government has got the right to act..... The Legislative Sovereign having been killed in the United States, the Legal Sovereign succeeds to the throne. Law is no longer, what the supreme legislature commands but is now what the supreme judge says.

If the function of the United States Supreme Court has been limited merely to acting as an arbiter between the Federal and State Governments it is hardly possible that it would have assumed the stellar role in the American legal drama but the constitution has been interpreted as conferring far wider powers upon the Court. The Fourteenth Amendment has made the Court the Censor of the State legislation. In England 'due process of law' means in accordance with law duly enacted or established but in America the phrase has given rise to a new and formidable principle under which any legislation unreasonably interfering with the natural right to freedom of contract or of calling and of property in the widest sense is held to be invalid. Professor Haines has termed this, '*modern revival of natural law*' in the American Constitutional Law. It is obvious that this doctrine places a peculiar emphasis upon the power of the judges and it ought to influence the attitude of the American in his approach to the Law.

Each State is developing a jurisprudence of its own which tends to become more and more independent of the law of other States.....If the results reached in various States conflict, it is due to a difference in interpretations by the Judges.

In England the deliberate and conscious creation of law by the Courts has never been thought of as a primary function of the judicial process but Dean Pound points out that the chief problem of the formative period is to discover and lay down rules. Above all

others, it was sought to ensure an efficient machine for the development of law by judicial decision. For a time this was the chief function of the highest courts.....It was just less important to decide the particular cause justly than to work out a sound and just rule for the future. Hence for a century the Courts were turned towards the development of case-law and the judicial hierarchy was set up with this purpose in view."

The conscious creation of law by the judges was inevitable, for, the less certain the law is, the greater will be the need for judicial legislation. In America the common law had to be adopted and fitted to new conditions and this was a work which only the judges could do. The legislative function of the Court was therefore marked to an unusual degree.

Hence the peculiar emphasis on the judges and on their creative power in American law. Have the Judges, then, an absolute authority? A deliberate and wanton attempt by the judges to reject a clearly worded statute would lead to an impeachment or revolution.[8]

The Conduct of the Court

The position of the Federal Court is enviable and sometimes unenviable too. The judges may be placed in delicate positions but they have always felt the dignity and grace of their high office and have always vindicated the impartiality of the Court. It is very often that party politics come into play and cases relating to them come before them. Interests of a 'state' as against a bigger 'nation' have to be dissected and decided. Sometimes political issues turn upon an interpretation. The interpreting Court assumes, then, a control over a pending case and declares certain acts legal, others illegal. Does not, then, the Federal Court assume control over the Executive and the Legislative branches of the Government? Is this an evil ?

8 *Modern Theories of Law*—by A. L. Goodhart D. C. L. (Prof. of Jurisprudence, Oxford University) p. 2.

America has avoided party decisions by several expedients.

(1) by always declaring that it is not concerned with political questions. In a matter exclusively political, legislative or executive, the Courts have no voice. Yet if cases come up in which the levy of a tax, or the validity of a treaty, upon motives and grounds not supportable by the intentions of the Constitution, are subject-matter of dispute and interpretation, the remedy has always been stated to be an appeal at the time of elections or the salutary method of an amendment to Constitution.

(2) the Court has always steadily refused to decide abstract questions or to give opinions in advance by way of advice to the executive. But in the India Act, advisory powers are taken for the Federal Court.

(3) the third factor which has maintained the Authority of the Court is the strength of professional feeling of the judges themselves.

The judges have nothing to fear. Under the United States Act, they are irremovable. After their appointment, their political trappings drop off, when they mount the Bench. Nothing more they have to get from party favours as they have climbed and cannot climb higher.

Under the India Act also, the appointments are made by His Majesty and they cannot be removed except on the ground of misbehaviour or of infirmity of mind or body and that too if the Judicial Committee of the Privy Council on reference by His Majesty reports that the Judges *ought* to be removed on any such ground. Sections 40 & 86 of 1935 Act (India) prohibits all discussion about Judges in the Legislatures.

(4) another steadying influence is the mutual respect between the Bench and the Bar, as members of one brotherhood.

The Bar (as in America) in India is likely to monopolise politics for a great time to come or at least the greatest political figures are to be found among the members of the Bar. They are sure to lead the public opinion of the country. When the Bar feels that the Bench has correctly expounded the Law or the Constitution, it is sure to give unstinted support to the Bench, which means obedience from the people.

(5) a still patent factor is the personnel of the judges. Other Federal Countries have been eminently fortunate in successive Chief Justices and many have been regarded as favoured gifts of Providence to the Nation. Bryce's encomium of John Marshall inspires us to hope for the best days of our Indian Federal Court. "This (special gift of favouring Providence) was John Marshall who presided over the Supreme Court from 1801 to 1835 (at the age of 80) and whose fame overtops that of all other American Judges, more than Papinian overtops the jurists of Rome or Lord Mansfield the jurists of England. No other man did half so much either to develop the Constitution by expounding it or to secure for Judiciary its rightful place in the Government as the living voice of the Constitution. No one vindicated more strenuously the duty of the Court to establish the Authority of the Fundamental Law, of the land, no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the Court, remain its bulwark, the traditions which were formed under him and have continued in general to guide the action and elevate the sentiment of their successors".[9]

Marbury V. Madison 1 Cranch 137 (1803) is a case determining the cornerstone of judicial supremacy.

The decision has been of very great importance in establishing the doctrine of judicial review, which came to be

9 *American Commonwealth*—by James Bryce Vol. I p. 268

looked upon as the special privilege of every Court, high or low. So, it has remained with an ever-widening scope up to the present day.[10]

Obligation of the Judges

The Federal Judiciary has the obligation of determining whether the enactment is in accord with the powers of the Parliament or whether it exceeds in whole or in part the legislative authority granted by the Constitution or is repugnant to an Act of the Imperial Parliament in force in the territory.

For the judges to be able to give authoritative judgments on matters affecting the validity of Parliamentary enactments, it is of course essential that they should be independent of executive control in the fulfilment of their duties.

The exercise of the independent jurisdiction of the Court affords the subject a large measure of effective protection against any disregard of his rights by the executive. [11]

Judicial Encroachment upon Legislative Authority

It is only a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen but they can never be so extensive as to amount to an inconvenience or in any sensible degree to affect the order of political system. This may be inferred from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from the comparative weakness and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting

10 Prof. J. A. C. Grant of Wisconsin. *American Political Science Review*, August, 1929, p. 680, 681

11 *Dominion Home Rule in Practice*—by Keith p. 3

impeachments in one part of the Legislative body and of determining upon them in the other, would give to that body, upon the members of the judicial department. This is itself a complete security.

Prussian Courts

The Prussian Courts have no such power of passing upon the Constitutionality of laws as is possessed by the Courts of the United States. They cannot go beyond the simple question whether a law has been passed or in administrative cases, an whetherofficial order is issued in due legal form.

CHAPTER VII

STATUTORY RECOGNITION OF THE FEDERAL COURT, AS THE ONLY INTERPRETER

Sec. 212 of the Act expressly states 'that the Law *declared* by the Federal Court *and* by any judgment of the Privy Council shall *so far as applicable* be recognised as binding on and shall be followed by, *all Courts in British India* and so far as respects the application and interpretation of this Act or any Order in Council thereunder or *any matter* with respect to which the Federal Legislature has power to make laws in relation to the State, *in any Federated State.*'

The last portion is very important. The Federal Court is not only to interpret the Constitution, the Act or any Order in Council but *also any matter over which the Federal Legislature may legislate in relation to the State in any Federated State.* eg. Laws which are of primary importance to a particular State over which the Federal Legislature has jurisdiction and legislates.

"Any matter" is bound to include questions of jurisdiction whether the particular enactment is of a Federal Nature, whether the Federal Legislature is within its limits in regard to that subject-matter as concerning that particular State, whether the enactment is not likely to trespass on the State Sovereignty either directly or indirectly, whether it is a colourable encroachment either way, whether a Provincial or State Legislature affects vested rights of the Federal State, to safeguard the citizens throughout the Federation without any preference to and without the hindrance to the State Laws. This provision is necessary to have a uniform Code of Federal Law and also to codify the State decisions as are

dependent upon the Federal Judicial pronouncements. The importance of the provision will be seen in its absence. There will be a chaos, utter confusion, conflict of decisions, different interpretations in different States on one and the same point, one being quoted against the other, and even the deciding Judges not knowing what to do. The establishment of a Federal Court is not by itself an unifying factor. Unless the decisions are held binding upon the States and unless they are to be followed like Gospel by the constituent States, the Court will not be of any avail. It would defeat its own purpose.

Indian Courts and Legislature

To look at the same thing from another point of view, the Courts in India treat the legislation of the Governor-General in a way utterly different from that in which any English Court can treat the acts of the Imperial Parliament. An Indian tribunal may be called upon to say that an Act passed by the Governor-General need not be obeyed because it is unconstitutional or void.

So the proposal that Federal Court should be given power to interpret the Constitution in order to enforce its provisions does not involve any change from the subsisting practice. [1]

Advisory Powers of the Court

It was intravires of the Legislature to impose this duty on the Court. The answers are only advisory and by giving them it cannot be said that a Court ceases to be such a judiciary as the Act provides for. *A. G. for Ontario V. A. G. for Canada* 1912 A. C. 571.

The power of a constitutional interpretation is not a general power. It is merely the authority to declare whether a particular Act does or does not transgress the limits set to the

1 *Law of the Constitution*—by Prof. Dicey, p. 98

law-making authority. This power does not give to the Federal Court, authority to entertain suits by private individuals against a State or a Ruler, alleged to have transgressed its or his legitimate authority. An action of such a type would be clearly inconsistent with the Sovereignty of the State. They must be rendered impossible by a constitutional provision.[2]

This has been done. It is a lesson we ought to learn from the Eleventh Amendment to the United States Constitution, arising out of *Chisholm V. State of Georgia.*

In a Federal Constitution, the vesting in the Supreme Court of the right to interpret the Constitution is a denial of the supremacy of the legislatures. The mere fact that a legislature has enacted a measure in due form is not conclusive with regard to its validity. The Federal Court is entitled to declare as such and void any law passed by any authority, if it conflicts with the Constitution.[3] But such a power in a Court is not without its baneful effects. There are very many objections—some of them are substantial.

Objections

1. Constitutional developments occur insidiously from the exploration of judicial niceties; a decision may give additional powers but takes away larger powers which are essential.

2. Courts interpret law; they do not give weight to political or administrative considerations. Judicial interpretation cannot be guided by any constructive purpose.

3. Judicial interpretations sometimes lead to political tendencies utterly unexpected and alien to the spirit of the Constitution.

2 *Federal India*—by Haksar and Pannikar p. 134

3 Do. Do. p. 137

Marshall's dictum of implied powers established the supremacy of the Federal Court to decide on the validity of Federal Laws.

Declaring Acts Void

The principle involved is not the right to call up a State-Statute and annul it but simply to say that a State-Statute contrary to the Federal Constitution or Statutes cannot possibly come into being, that from the moment of its passage, it has no life or force and that therefore, the Court may leave it out of account in making up its mind.

(1) First application of this principle was in *United States V. Judge Peters*, 1809, in which an Act of the State of Pennsylvania intended to prevent a decision by the Court, was declared to be of no effect.

(2) Even parts of Constitutions have been disallowed. *Cummings V. Missouri*, 1866, by which certain sections of Constitution, seeking to disenfranchise and disqualify persons who had aided the Confederate States were disallowed because it was *expost facto* and of the nature of Bills of Attainder.

(3) *Gibbons V. Ogden*, 1824. The Supreme Court disallowed a New York statute giving a monopoly of steam navigation on the Hudson on the ground that the Hudson was usable for foreign commerce.

(4) *McCulloch V. Maryland*, 1819. A tax on the United States Bank was held invalid because the Bank was an agency of the Federal Government.

No State shall pass a law imparing the obligations of contracts.

Fletcher V. Peck, 1810. A grant of land once made by a Georgia Legislature, could not be revoked by a subsequent legislature, because it was a contract with the grantee.

Dartmouth College Case, 1819. The above principle was widened by holding that a charter given to a College Corporation for the public purpose of educating young men was likewise, an irrevocable contract.

Under this, the general principle holds, that if a State Legislature or a City Council under State authority grants a charter or a franchise without a limit of time or the reserved right to alter, it is a perpetual grant. Under this principle, States and Cities have for ever parted with privileges worth millions of dollars.

Judicial Power and Constitution—Legislature

An interesting and important question arises in the case of the Commonwealth in as much as the judicial power is vested in Courts defined by the Constitution. It is suggested by Prof. Harrison Moore that the result of this enactment is to deprive the Parliament of any power to deal with matters which are judicial, by means other than those of the Courts and he deduces from the *Hiddart Parker Case* 8. C. L. R. 330 that while the Parliament could provide that certain matters could be enquired into by the Controller-General of Customs, it could not empower him to impose fines. Nor again, he urges could the Parliament pass an *expost facto* law making criminal acts which when done, were lawful, though not every retrospective act is an act of this prohibited class.[4]

From the Parliamentary point of view, exception has been taken to judicial enquiries into matters which lie within the sphere of the action of the Parliaments when the Government of Canada tried to set up a Royal Commission to enquire into the Pacific Railway scandals, a liberal member (Seth Huntingdon) refused to give evidence, as the appointment was an improper interference with the privileges of the Parliament.

4 *Responsible Government in British Dominions*—by Keith Vol. II p. 890

The same matter came up when the Government set up a commission of enquiry as a result of the attacks on the land department. It was stated that the commission may call upon members of opposition to give evidence on oath which was a denial of free speech in the Legislatures.

The Swiss Federal Court

In one aspect, the Swiss Federal Court differs widely from that of the United States. In the latter the constitutionality of the laws even of the highest Legislature of the land can be brought into question and if such statutes do not agree with the federal character, they are declared invalid. But in Switerland, the Federal Court can only move *within the limits set by the Legislature. The Federal Assembly is declared to be the sole judge of the constitutionality of its measures.*[5] Still this does not prevent the Court from testing a cantonal law as to its compliance with the Federal Constitution, as may be seen in the case of *Bank of Freiburg V. Cantonal Bank of Freiburg.*

With all their facilities for revision of the Constitution and for popular expression upon law, it would seem as if the matter of final interpretation should be left to a calmer authority than a national congress.

The real position of the Court is viewed by an equally eminent authority in a peculiar way.[6] 'It has the important function as an arbiter in questions of Public Law. It follows the English practice of regarding Public Law as something different from Private Law..... Dr. Dubes, one of the most eminent of the Swiss Jurists and for many years, a member of the Federal Court, considered the expounding of Public Law, as the chief duty of the Federal Tribunal and the primary object of its existence.

All the same, the Swiss Tribunal is not in an advantageous position. A close constitutional study will show, that

5 *Government in Switzerland*—by Vincent p. 207

6 *Government and Parties in Continental Europe*—by A. L. Lowell p. 216, 220

1. the Court stands alone, instead of being at the head of a great national judicial system.

2. it is bound by an express provision of the Constitution to apply every law passed by the Federal Assembly. It has none of the peculiar authority of holding statutes unconstitutional and none of the exalted dignity which that Authority confers.

3. owing to the method of dealing with administrative matters, the Federal Tribunal has less authority over public officials than the Supreme Court of the United States.

4. any citizen can sue a Federal Official.

5. although conflicts of jurisdiction between the Federal Tribunal and Cantonal Authority are decided by the Federal Tribunal, conflicts between the latter and the Federal Council are *decided by the Federal Assembly.*

Cantonal feeling is so very strong.

Italy

So also in Italy. The Statute itself declares, that the interpretation of the law in such a way as to be universally binding, belongs exclusively to the legislative power. The Italian has such a great dread of that wholesome form of legislation, judge-made law!

A dispute concerning the interpretation of this Act, has to be distinguished from cases likely to arise out of the laws of the Indian Federation.

Federal Court—A Hindrance as an Interpreter !

" Constitutional development has depended upon legal casuistry on numerous occasions in the recent past ! The Supreme Court of the United States has blocked the way of legislation universally admitted to be of a benevolent character ! In 1895, this Court held Income Tax to be unconstitutional, the

result was an elaborate and cumbrous process of amendment of the Constitution to give the Central Government the right to levy this tax! The Court's decisions with regard to the right of owning slaves led to the civil war."[7] These decisions have made even law-minded citizens to feel aghast and exclaim that the Court shall cease interpreting the Constitution! It looked as though "regions, the fathers never knew, were passing under Federal control. The Court was given the impossible task of findings in legal terms which daily grew, more outworn solutions to economic problems which daily grew more subtle.....sometimes it has intoned the obscurities of dead philosophers, at others it has voided the election returns." [8] A more outspoken denunciation of this view is not possible, still the better side of the shield that it is the corrector of the constitutional follies ought to be remembered and cherished always. Else the Federal Structure will collapse.

Legal Disallowance

The power of legal disallowance is not clearly granted to this Court.

But it is accepted. There are several inherent defects in the system. To state them briefly and categorically,—

(1) when judicial decisions come into conflicts with executive opinions, there is no sanction by which the decisions of the Court can be enforced. It leads to a deadlock. An order of release of persons imprisoned by a local court was defied with the threat of

> "Justice Marshall has pronounced his judgment, let him enforce it, if he can."

(2) Dred Scot case.—The Supreme Court held, it had no power to prevent slavery in States. This decision was considered

7 *Federal India*—by Haksar and Pannikar, p. 26

8 *The American Federal System*—by Smellie

a legal tragedy and the merit of the Court as an Interpreter was and had to be questioned. Abraham Lincoln protested in anger, "if the policy of the Government is to be irrevocably fixed by decisions of the Supreme Courts in ordinary litigation between parties....., the people *will have to cease to be their own rulers*".

(3) every issue might have to be fought out, as litigation between private parties.

(4) a law that has been on the statute book may be suddenly declared illegal. Legal enactments are thus rendered precarious.

In India, the Mussalman agitation against the Sarda Act provides an example. The power of judicial disallowance might in India restrict legislative authority to such an extent that legislation might become well-nigh impossible, unless extensive *authority were reserved to the Central Government.* [9]

9 *Federal India*—by Haksar and Pannikar

CHAPTER VIII

FEDERAL LAW

"The National Courts are not created solely to apply to national legislation but to apply to all the various kinds of legislation to national issues. A federal statute, a treaty, an executive order, a state constitution or statute, a municipal ordinance, a vote of the Directors of a railroad may be all parts of the legal condition which a Federal Court must take into account. In like manner State Courts are constantly called upon to take cognizance of and to apply the federal constitution, statutes and treaties. The fundamental principle is that the National Courts shall primarily or by appeal, have the right to decide all cases involving the exercise of Federal authority or rights and privileges created under the Federal Constitution".

Principle of Removal even to Executive Acts

The principle is applied even to executive acts of the Federal authorities. If a Federal officer arrests a person, a State Court has no jurisdiction to release him on a writ of Habeas Corpus or otherwise to enquire into the lawfulness of the detention. Chief Justice Taney would say 'the powers of the General Government and of the State although both exist and are exercised within the same territorial limits, are yet separate and distinct soverignties acting separately and independently of each other within their respective spheres. The sphere of action appropriated to the United states is as far beyond the reach of judicial process issued by a State Court as if the line of division was traced by land marks and monuments visible to the eye.[1]

1 *Ableman V. Booth* 21 How. 516.

Jurisdiction

"All the enumerated cases of Federal cognizance are those which touch the safety, peace, sovereignty of the nation or which presume that State Attachments, State Prejudices, State Jealousies and State Interests might sometimes obstruct or control the regular administration of justice. The appellate power in all these cases is on the clearest principles of policy and wisdom and is necessary in order to preserve uniformity of decision upon all subjects within the purview of the Constitution". Kent's division of the cases is interesting.

Kinds of Cases

1. Cases in law and equity arising under the Constitution, the laws of the nation and the treaties made under their authority:—

(a) this entitles a plaintiff who relies upon a Federal Law as his basis of claim to bring his case before Federal Court.

(b) so also a defendant who rests his defence on a Federal enactment. He is entitled to move for the transfer of the case from the State to the Federal Court. But there will be no reason for removal of the case unless the authority of the Federal enactment can be supposed to be questioned.

The rule laid down by the Judiciary Act (1789) provides:— for the removal to the Supreme Court of the United States of the final judgment or decree in any suit, rendered in the Highest Court of Law or Equity, of a State in which a decision could be had, in which is drawn in question the validity of a treaty or statute of, or authority exercised under the United States and decision is against their validity.

or where is drawn in question the validity of a statute or of an authority exercised under any statute on the ground of their being repugnant to the Constitutions, treaties, or laws of the United States and the decision is in favour of their validity.

or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute or a commission held or authority exercised under the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution treaty, statute, commission or authority".[2]

Dec Tocqueville in *Democracy in America* has the following classification—

He would define jurisdiction under two heads.

(a) Certain parties must always be brought before the Federal Courts without regard to the nature of the case.

(b) Certain causes must be brought before the same Courts without any regard to the quality of the parties in the suits.

In the first category fall the following,—

1. Suit against an ambassador as it affects the welfare of a nation which he represents.

2. Proceedings in which the Union or Federal Government is a party—as it can appeal only to its own sovereignty and not any other.

2 Kent's *Commentaries*, Holmes Edn. Vol. I p. 320

3. Parties belonging to different states, as the decision by a Federal tribunal will not excite the suspicion of either party and as it offers the most natural remedy.

4. When States are parties, the most trifling litigation may be said to involve the peace of the whole Federation.

Under the second, come the following—

1. Questions of maritime commerce.

2. All questions connected with the interpretation of the law of nations.

3. All cases in law and equity arising under the law of the United States, when the laws of the United States are attacked or wherever they are resorted to in self-defence. Their chief solicitude is to arm the Federal Government with sufficient power to resist the encroachments of several states.

4. Cases which arise under laws made by the several States in opposition to the constitution or from laws which have a tendency to impair the obligation of contracts.

The leading case on this point is *Dartmouth College* (New Hampshire) *Case*. It was a college established by a charter before the American revolution. Later the legislature of New Hampshire without the consent of the Corporation passed an Act changing the character of the original constitution as per the previous charter and transferred all the rights to a set of new trustees appointed under a fresh charter. The Supreme Court held that the new act was utterly void as imparing the obligations of the previous charter.

On this last class of cases, Dec Tocqueville had considerable apprehension that it does attack the independence of the States 'as there are vast numbers of political laws which influence the existence of obligations of contracts which may thus furnish an easy pretext for the aggression of the Central Authority.'[3]

Another learned Constitutionalist would divide the cases in a slightly different way. It is more crisp.

(1) Jurisdiction over Cases affecting Ambassadors, other Public Ministers and Consuls.

As these persons have an international character, the State Courts should not be permitted to deal with them. In fact the halo of intelligence and impartiality that surrounds a Federal Court in cases of this kind will be lacking in a State Court.

(2) Cases of Admiralty and Maritime Jurisdiction

Includes prize cases, maritime contracts, transactions relating to navigation, navigable lakes and rivers of the United States as on the high seas.

(3) Controversies to which the Federal State (United States) shall be a party.

This is intended to protect the Federal State from being sued or being obliged to sue in a State Court to whose decision, the National Government cannot be expected to submit.

(4) Controversies (a) between two or more states. (b) between a state and citizens of another state (c) between citizens of different states (d) between citizens of the same state claiming land under grants of different states (e) between a state or citizens thereof and foreign states, citizens or subjects".

The Federal Court is an unbiassed and competent tribunal not subject to local prejudices but composed of judicial officers

3 *Democracy in America*—by Dec Tocqueville, p. 142

named by the National Government and unamendable to local influences."

The following are generally the writs issued by several Courts as obtainable in several Federal Constitutions,—

Writs issued by Federal Court

They are for the following purposes,—

1. to enforce or vacate a judgment, recognizance or patent.
2. issued against a person holding office in violation of the Federal Constitution or Laws.
3. calling upon a corporation directing it to show cause why its charter should not be forfeited.
4. injunction against the defendent in equity cases preventing him from leaving the Federation.
5. issued to call up for review in a superior court, the record of proceedings in an inferior court.
6. issued to stay proceedings.

More important writs are :—

1. Habeas Corpus—It is frequently invoked before Federal Courts in order to test the legality of an arrest under State Authority. In the *Haymarket Murder case* in 1886, it was prayed before the Supreme Court of the United States on the ground that there were informalities in the trial, contrary to the personal rights guaranteed by the Constitution. But the Court declined to interfere.

2. Mandamus. It is directed against individuals and corporations to compel them to perform neglected duties. *In Kendall V. United States*, 1838, the Post Master General, Kendall was compelled to pay certain money.

3. Injunctions. 2 Kinds.

(a) Temporary restraining order, to prevent one of the parties to a suit from disposing of the property or otherwise altering existing status, pending a hearing on the merits.

(b) Permanent injunction, forbidding a person from performing an act which would create consequences that could not be remedied by a later suit.

Injunction of late has been pushed much farther. The most interesting case is that of *Debs* in 1894. The District Court in Chicago issued an injunction forbidding all persons to obstruct the circulation of mails or the movement of Inter-State Commerce. Debs was the leader of a strike. For his refusal to observe this injunction, he was arrested, fined and imprisoned. It was argued by Debs's counsel that if his client, was guilty of any wrongful act, he was entitled to a jury trial and the Court was not competent to add another penalty, not defined by statute and that injunctions did not lie against acts which were punishable under ordinary law. But the Supreme Court affirmed the right of the Lower Court to grant an injunction.[4]

Federal Laws

Extent

The legislation of the Federal Legislature so long as it related to subjects enumerated in the section which controls the "Federal Legislature - subjects" is of paramount authority even though it trenches upon matters assigned to the provincial Legislature under the Act. [5]

Even if any legislation affects 'civil rights in the province' which are left exclusively to the provincial legislature, it will

4 *Actual Government* — by Hart p. 307, 308

5 *Tennant V. Union Bank of Canada.* 1894 A. C. 31

be competent provided it was within the jurisdiction of the Federal Legislature or was ancillary to any legislation which it can enact. [6]

Co-ordinate - Which to Prevail - If in Conflict

There are matters in which both the Federal and State or Provincial Legislatures have jurisdiction, and as such they are likely to legislate on such matters without conflict. But if there is a conflict, the situation becomes uneasy. The Indian Constitution Act has provided that the Federal Law should prevail. It is consonance, with the wisdom, experience and judgment of Federal Courts and Privy Council. Sir Arthur Wilson deciding *La Campagnie Lique De St. Francis V. Continental Heat and Light Company* [7] said 'whereas a given field of legislation is within the competence of the Parliament of Canada (Federal Legislature) and of the Provincial Legislature and both have legislated, the enactment of the Dominion Parliament must prevail over of the province, if the two are in conflict.

A Provincial Legislature has no power to limit the right of appeal from the Provincial Courts to the Supreme Court; where the subject matter is open to both the Legislatures, the Dominion enactment must prevail. [8]

When plenary powers of legislation exist as to particular subjects whether in an Imperial or in a Provincial Legislature, they may be well exercised either absolutely or conditionally, in the latter case leading to the discretion of some external authority, the time and manner of carrying its legislation into effect, as also the area over which it is extended [9] The Government of India cannot by legislation take away the right

6 *Grand Trunk Railway of Canada V. A. G. of Canada. 1907 A. C. 65*

7 1909 A. C. 194.

8 *Grown Grain Co., Ltd., V. Day* 1908 A. C. 504

9 *R. V. Burah* 1878 3 App. Cas 889 P. C.

of a citizen to proceed against it in a Civil Court in respect of any right over land.[10]

Federal Law V. State Law

Federal courts ought to follow, of course, first the laws of the Federal Legislature. If they are applicable to a set of circumstances they ought to prevail even against State Law on the same matter.

But in cases between citizens of different States, when the Laws of the State have to be applied, the Federal Court will first determine which State-Law has to be applied, and then it will apply the same. In these matters the previous decisions of the State Court ought to be respected and followed. *The idea has gained ground in all Federal Courts that the supreme Court of the United States did not hesitate to overrule its own previous pronouncements and decisions and brought its opinion in line with the considered view of a State Court.*

"The Judicial Department of every Government is the appropriate organ for construing the Legislative Acts of the Government. On this principle, the construction given by this Court to the Constitution and the Laws of the United States is received by all as the true construction and on the same principle, the construction given by the Courts of various States to the Legislative Acts of those States is received as true, unless they come in conflict with the Constitution, Laws or Treaties of the United States—Marshall C. J. *in Elemendorf V. Taylor*, 10 Wheat 109.

Limitations for Removal of Suits

To authorise the removal under the Act, it must appear by the record either expressly or by clear and necessary intendment that some one of the enumerated questions in the Act *did arise*

10 *Secretary of State for India in Council V. Moment* 1912. 29 T. L. 140 P. C.

in the State and was there passed upon. It is *not sufficient* that it *might have arisen* or been applicable. And if the decision of the State Court is in favour of the right, title, privilege or exemption so claimed, the Judiciary Act does not authorise such removal, neither does it where the validity of the State Law is drawn in question and the decision of the State Court is against its validity." [11]

The reasonings above are obvious. The motive and working are plain. If the State Court applies the Federal Law and enforces it by its decision, there is no necessity for a transfer but if it does not follow such a course, and if its decision is against the applicability of the Federal Law, it is only natural that the party who suffers by it, should insist on the Federal interpretation of the case and so he has the right to carry it before the Supreme (Federal) Court.

Repugnancy to Federal Law

The theory of "Repugnancy to Federal Law" has been well stated in *Phillips V. Eyre*[12] by Willes J. (1870 L. R. 6 Q B. I.) in a question relating to English Law. The Colonial Law should be either contrary to some positive Law of England or to some principle of natural justice, the violation which would induce the Court to decline giving effect even to the Law of a Foreign Soverign State. In the former point of view, it is clear that the repugnancy to English Law which avoids a Colonial Act means repugnancy to an Imperial statute or order made by authority of such statute, applicable to the Colony by express words or necessary intendments and that so for as such repugnancy extends and *no further*, the Colonial Act is void. A Local Legislature is forbidden to enact anything repugnant to any Imperial Legislation for which express provision is given under the Constitution and it is not otherwise to derogate its own powers.[13]

11 *Constitutional Limitation*—by Cooley p. 16.

12 *1870 L. R. 6 Q B. I.*

13 *R. V. Marais Ex Parte Marias 1902 A. C. 51.*

When certain Provincial Acts purported in effect to preclude dominion companies from carrying on business in the province unless registered or licensed thereunder under their own acts and imposed penalties upon companies so doing, the validity of the provincial enactments was canvassed. [14] Viscount Haldane said 'If therefore in legislating for the incorporation of the companies under dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status, which enables them to exercise their powers in the provinces, they cannot be interfered with by any Law of the Province in such a fashion as to derogate from their status and their consequent capacities or as the result of this restriction, to prevent them from exercising the powers conferred upon them by the Dominion Law. If not, the Provincial Laws will sterilize or even effect the destruction of the capacities and powers which the dominion had validly conferred.....Within the spheres allotted to them by the Act, the Dominions and the Provinces are rendered on general principles Coordinate Governments. As a consequence, where one has legislative power, the other has not (speaking broadly) the capacity to pass laws which will interfere with its exercise. *What cannot be done directly cannot be done indirectly.* This is a principle which has to be kept closely in view in testing the validity of Provincial Legislation under consideration, as affecting dominion companies".

The Federal legislature has power (under the British N. A. Act) to enact laws which relate to pilotage *although they trench upon property and civil rights in a province. Paquet V. Pilots Corporation* 1920 A. C. 1029.

A Provincial Legislature cannot enact that, unless a Federal railway company erects proper fences on their railway lines, it shall be responsible for cattle injured or killed thereon and it will be ultravires. *Madden V. Nelson and Fort Shephered Ry. 1899* A. C. 626. Nor can it enact a law that goes against the

14 *Great West Sadderly Co. V. The King 1921 (2) A. C. 91.*

provisions of a treaty entered into between the Federal or Dominion Government with a foreign power by which certain rights of foreigners were recognised in *all* the Provinces. *Att. G. of British Columbia V. Att. G. of Canada 1924 A. C. 203.*

The imposition of a Succession Duty in respect of property outside the province upon the death of the owner domiciled within it, is ultravires the Legislative Power of the province, since the duty imposed is not direct taxation having regard to the provision for its collection, *Burland V. The King 1922 1 A C. 215.* It was held that a statute of the Legislature of Manitoba which provided for the collection of a tax from persons selling grain for future delivery was ultravires as it was not direct taxation and the person who was paying tax would indemnify at the expense of others and it was not possible to assume that the Legislature intended to pass it 'in a truncated form' *Att. G. for Manitoba V. Att. G. for Canada* 1925 A. C. 561. *Rex. V. Culedonian Mines 1928 A. C.* 358. Railways and bridges beyond the Jurisdiction of the States are under the control of Federal Government and they are not affected by any treaty entered before, *Att. G. for New Brunswick V. Canadian Pacific Railway.*

An Act prohibiting under penalty the export of any timber without a certificate that the tax due in respect of it has been paid, was held to be invalid, as the tax was an export tax which the Dominion Legislature alone can levy, *Att. G. for British Columbia V. Macdonal Murphy Lumber Co.*—1930 A. C. 357.

Dominion is a mistress in her own house as the province is within hers. *Edwards V. Att. G. for Canada 1930 A. C. 124.*

No Province can pass an act interfering with the freedom of Inter-State trade. *James V. Cowan* 1932 A. C. 542.

Attempt to Oust Federal Law

In Crown Grain Company Ltd. V. Day 1908 A. C. 504, a question arose whether it was competent for the Legislature

of Manitoba to set up a special jurisdiction from the exercise of which there would lie no appeal to the Federal Court. The Privy Council held it was not possible for the Provincial Legislature to do any thing which would have the effect of preventing appeal lying in all cases from the Provincial to the Federal Court.

In Ontario in 1909 it was proposed to limit appeals to the Supreme Court as well as to the Privy Council by a Provincial Act but this was not done, as it was ultravires. *Canadian Annual Review* 1909 p. 368.

Federal Enactments Can Override,—Cannot Repeal

Dominion Enactments when competent, override but *cannot* directly *repeal* Provincial Legislation. Whether the Dominion enactments have in a particular instance effected a virtual repeal by repugnancy is a question for adjudication by the tribunals and cannot be determined by either the Dominion or Provincial Legislatures. Neither the Federal nor the Provincial Legislatures can repeal what they cannot enact, *Att. G. Ontario V. Att. G. Dominion of Canada 1896 A. C. 348.* It was declared that a Provincial Legislature has jurisdiction to restrict the sale within the province, of intoxicating liquors so long as its decision does not conflict with any of the legislative provision which may be competently made by the Federal Legislature and which may be in force within the Province or any District thereof. It might be that unless the Provincial Act becomes a dead letter, it may interfere with the revenue of the Dominion. But it cannot make the Act unconstitutional, *Att. G. Manitoba V. Manitoba Licence Holders Association* 1902 A. C. 73 at 80.

When the Law of a State is inconsistent with a law of Commonwealth the latter shall prevail. Justice Isaacs in *Federated Sawmill V. James Moore and Son 1909. 8 C. L. R.* says 'the section in the Act itself is explicit (so in the India Act too). The true way to test the argument in a case is to ask whether the Federal Act would be valid supposing the State Act were

nonexistent. If it would, then in case of inconsistency, the State Law whatever it may be, under whatsoever power enacted, on whatsoever subject, must to the extent of the inconsistency be invalid. *This Constitutional Provision is essential to the very life of the Federation.*

State Legislature

The right of the State Legislature is always preserved but not to the extent of going against the spirit of Imperial Legislation. *R. V. Marias Ex. p. Marias* 1902 A. C. 51. A Colonial Legislature is not a delegate or a Deputy of the Imperial Legislature. It is restricted in its powers but within its sphere, it is supreme. *Huge V. R.* 1883 9 App. Cas 117 *Provell V. Appolo Candle Co.* 1885 10 App. Cas 282. *Canadian Pacific Wine Company Ltd. V. Tuley* 1921 (2) A. C. 417.

Acts for the suppression of liquor traffic in the province are within the powers of the Provincial Legislature, *Att. G. Manitoba V. Manitoba Licence Holders Association* 1902 A. C. 73. *Canadian Pacific Wine Co Ltd., V. Tuely* 1921 (2) A. C. 417, *R. V. Nat Bell Liquors 1922 A. C. 128.* The Federal Legislature is not entitled to pass measures interfering with the rights or autonomy of the internal trade and commerce within States. The Combines and Fair Prices Act which assailed the formation of trade-combines in States was held ultravires the Dominion Legislature, in *Re Board of Commerce Act and Combines and Fair Prices Act* 1922 I. A. C. 191., nor can the Dominion Legislature interfere with the trade conditions of a State by passing any Act controlling the employers and employees. *Toronto Electric Commissioners V. Snider* 1925 A. C. 396. A Provincial Act, if it contains a provision, can revoke the dedication of crown lands and any recital in the Order in Council will not be a Bar. No Act of the Executive can fetter the future exercise of its powers by the Legislature, *Commonwealth of Australia V. State of New South Wales* 1929 A. C. 431. The doctrine that a statute passed by a State repealing a

grant of land to an individual made on certain terms by a previous Statute is a law impairing the obligations of a contract and therefore invalid under the Federal Constitution was established in *Fletcher V. Peck 6 Cranch P.* 87.

Contract

1. A grant made by the State to a private individual and accepted by him is a contract and cannot be revoked by any future Law.

2. A charter granted by a State to a company is a contract and is equally binding on the State as on the grantee. [15]

States as Parties in Federal Suits

A Suit against the State Treasurer to compel the reception of money was held to be a suit against the State and was therefore contrary to the (Eleventh Amendment of the) Constitution. In *re Ayres.* 1887.

States and Individuals

In the United States V. Judge Peters 1809, the Pennsylvania State eventually yielded to the Federal Court-marshal arresting certain persons in Pennsylvania State under the authority of the National Court.

3. *Martin V. Hunters Lessee* 1816. In this, the Court of Appeals of Virginia was compelled to follow the mandate of a writ of error.

4. *Cohens V. Virginia.* 1821. Although the Cohens were citizens of Virginia, an appeal could be obtained through writ of error in a criminal suit proceeded against them by Virginia. It was held (i) that as the case involved a privilege under Federal Law denied by the State Court, it was a federal case even though the

15 Story Commentaries p. 503

State was a party. (ii) that since the original suit was not commenced or prosecuted against Virginia but begun by the State and since the suit was afterwards continued by the writ of error, the Eleventh Amendment did not apply.

5. A curious attempt by a State to sue an individual was in the case of *Mississippi V. Johnson* 1866 which was an application to prevent Johnson from carrying out the reconstruction statutes in Mississippi. The Court without dissent refused to entertain a suit in matters *'Executive and Political'*.[16]

Position of the Supreme or Federal Court

At present the position of the (Supreme) Federal Court is that it will not take action to compel a State formally to appear against its will, except on the suit of another State; that it will not entertain suits against State Officials to compel them to perform duties against the will and direction of their State Government but that in controversies begun by a State against an individual, it will take jurisdiction on writ of error and may decide against the State. In cases between individuals also, the Supreme Court freely discusses the Statutes of the State and often lays down limitations on their powers.

Disallowance of Federal Statutes by Federal Courts

It is not clearly set forth in the Constitution, and it was many years before it came clear that such a power was necessary for the maintenance of a Federal Government. It is a power unknown to the English Courts and is prohibited by the Federal Constitution of Switzerland.

1. *Marbrary V. Madison 1803.* This is the first case in which a Federal Statute was declared outright unconstitutional.

2. *United States V. Ferreira 1851.* It declared an Act void.

16 *Actual Government*—by Hart, p. 313, 314

3. *The Dred Scot Case 1859.* The Missouri Compromise of 1820 was held as not authorised by the Constitution. This was the first instance of a broad statute based on the general powers of the Congress being set aside.

4. *Civil Rights Cases 1883, 1884.* Acts for the benefit of the Negro citizens were disallowed.

5. *Trade Mark Cases* 1879. The power of the United States to register trade marks on general commerce was denied.

6. *Income Tax Cases* 1895. A tax on incomes was held to be unconstitutional, as it was a direct tax which must be apportioned by population.

While the Supreme Court freely and frequently throws out local and state statutes, it hesitates to invalidate national (federal) statutes. The Supreme Court acts on the presumption that the Congress is within its powers unless a case too strong for it to ignore, is made out.[17] Viscount Haldane said: 'It is always with reluctance that their Lordships of the Privy Council come to a conclusion adverse to the constitutional validity of any Canadian Statute that has been before the public for years as having been validly enacted, but the duty incumbent upon the Judicial Committee is simply to interpret the British North America Act and to decide whether the Statute in question has been within the competence of the Dominion Parliament.[18]

A provincial legislature has no power to pass a legislation prejudicially affecting any right or privilege of denominational schools which any class of persons have by law. It is ultravires. The Board of Management cannot be superceded in pursuance of such an act and no substitute can come in.[19] However moneys spent by the management in charge at the time of the superces-

17 *Actual Government*—by Hart, p. 319.

18 *Toronto Electric Commissioners V. Snider*, 1925 A. C. 396 at 400.

19 *Ottawa Separate Schools Trustees V. Ottawa Corporation* 1917 A. C. 76.

sion were held valid expenditure as in any case expenditure would have been made, though the hands that did it might have been different. [20]

What are Civil Rights?

An Act of a Provincial Legislature dealing with fire insurance contracts was not a matter relating to trade and commerce but was a matter affecting civil rights and was within the power of a Provincial Legislature.[21] A Province cannot grant the exclusive right of fishing in either the tidal or the navigable non-tidal water within the railway-belt and it cannot come in under the phrase 'civil rights' in the province.[22]

Money that was lying in a Provincial Bank—moneys that were raised by an abortive enterprise to start a railway—could not be withheld by the Bank by any Act of Provincial Legislature stating that the same ought to form a part of the general revenue fund of the Province. Such a Legislation cannot be under the Civil Rights of the Province. A subscriber or a bond-holder has a right to recover back the amounts paid and the act is ultravires.[23]

20 *Ottawa Roman Catholic Seperate Schools Trustees V. Quebec Bank* 1920 A. C. 230.

21 *Citizens Insurance Co. of Canada V. Parsons Queen Insurance Company* 1881 7 App. Cas 96.

22 *A. G. for British Columbia V. A. G. for Canada 1914 A. C. 153 A. G. for Canada V. A. G. for Quebec 1921 I. A. C 413.*

23 *Royal Bank of Canada V. R.* 1913 A. C. 283.

CHAPTER IX

THE DUTIES OF THE FEDERATION AND THE RULER OF THE STATE— THE FEDERAL COURT: THE ARBITER

An important power has been vested in the Federal Court to decide upon the legality of the exercise of the executive authority of the Federation in the State and the States' exercise of its own authority without prejudice to the Federation.

'Paramountcy-Bias'

Reading of the Sec. 128 which confers this power, sounds to a constitutional ear that it does have a note of "inferiority complex" regarding the Indian States. The heading of the section is 'the *duty* of a Ruler of a State' and has no reference to the corresponding duty of the Federation to the State!. Again sub clause (2) invests powers in the Governor-General *to act in his discretion*, after *considering* the *representations* made to him by the Ruler, if it appears to the Governor-General that the said Ruler has in any way *failed* to fulfil his *obligations*. The Governor-General may issue such *directions* as he thinks fit.'

Of course the proviso makes provision for a reference *either by the Federation or the Ruler* to the Federal Court for a determination. This proviso removes the misapprehension conveyed by the reading of the first portions of Sec. 128. This creates the equality, or equal opportunity to complain and announces the superior position of the Federal Court to decide on the interpretation of the exercise of the authority. One has to remember, that even in the question of paramountcy claimed, the distinction stated by Sir Tej Bahadur Sapru in the closing sessions of the

Federal Structure Committee—'the question of paramountcy in relation to the Crown is one thing and in relation to the Federation is quite a different thing. *There can be no such thing under a Federal Constitution as one paramount* unit of the Federation exercising paramountcy over another unit of the Federation. Their basis of Federation is *equality*'.[1]

Such being the spirit of the New Constitution, it is rather unfortunate that the Section should be capable of being interpreted in a slightly different way as being written up with a 'paramountcy bias'. It could have been avoided and the phraseology could have been better.

Constitutional Break-down

The failure in obligations may be by a Federated State, as well as by the Federation or by a Governor's Province. The reference to one class of failure, without mention of others but providing for references to a Federal Court by any of the two parties,Federation or the Ruler of an Indian State, and the Governor-General to issue directions as he thinks fit"—is one of the most unfortunate wordings in the whole Act, negativing the spirit of relationship attempted to be achieved in the Constitution. To put the matter more pointedly, why should not the Ruler be provided with a power to issue directions to the Federation or to the Governor-General in a case of trespass of the Federation upon State rights, under the cloak of exercise of Federal Law? It is indeed a Constitutional weak-spot, a gap probably unwittingly left which really strikes at the very basic idea of a federal brotherhood. A duty by one unit of the Federation involves a corresponding one by another, as a sacrifice by one part does connote a similar act from the other part. To talk of duties or sacrifices of one part alone, is a negation of the Federal ideals, and to go further with a provision of even a *direction* to an alleged defaulting party will sap the very little vitality left in a Federal idea. It passes notice how the protagonists of the Scheme allowed this to happen

1 Federal Structure Committee Proceedings p. 629.

and it is hard to believe whether the Clause, when written, was viewed with all its implications which lead easily to subservision of all the sentiments of equality, ideals of Sovereignty, constantly dinned into the ears of the Federal Structure Committee by the two very intelligent and eminent Statesmen-Princes from India, H. H. The Maharajah of Bikanir and H. H. the Nawab of Bhopal and the redoubtable champion of H. E. H. The Nizam, the Right Hon. Nawab Sir Akbar Hydari. It is up to the Constitution-makers to repair this wrong by suitable additional provisions or modifications of the present Section.

Duties of The Federation and a Ruler

Though the section does not expressly state the duties of the former, we see them impliedly. The Federation should exercise its executive authority in a State, only within and not beyond the extent to which it is so exercisable. It shall not interfere with the authority of the State or of the constitutionally valid laws in that State. The State shall not impede or prejudice the exercise of the executive authority of the Federation within the legal limits as prescribed by a law of the Federal Legislature.

Demarcation of Limits

The limits of a law, Federal or State, cannot be concretely stated. Decisions will have to state the boundaries, the confines and the jurisdiction of the two laws. Whether any particular law of the Federation can be applied and whether the Federal Executive should exercise it, will have to be decided first and secondly the limits or extent to which the exercise of the Executive Authority can go will have to be determined.

In these two aspects of the problem, one may have bonafide doubts or even sincere settled opinions. But when differences arise between the States and the Federation, the matter has to be decided. This has to be done under the Original Jurisdiction of the Federal Court. This is a peculiar duty, that does not come under the general and ordinary powers of the

Federal Court as detailed in the Chapter entitled 'The Federal Court'.

The section relates to what a lawyer may call a stage of settling preliminary 'legal and jurisdictional' points in a matter before Court. The application of the Act and the extent or even method, as method may be indicative of the extent sometimes, of exercise of a particular Federal Law in an Indian State, have to be dealt with under these sections.

Supremacy of the Court Again

In the Australian Constitution, power is given under sec. 77 to the Paliament to make Law, defining the extent to which the jurisdiction of any Federal Court other than the High Court, and defining the *extent* to which the jurisdiction of any Federal Court, shall be exclusive of that which belongs to or is invested in the Courts of the States".

This provision has not been followed in the India Act and the power to define the borderland of the Federal Law's jurisdiction, and the force and operation of it in a Federated State, have been vested in the Federal Court itself. A Federal Court under the India Act has to decide whether the Executive authority in respect to any matter is exercisable in any State and if so, how far. It is far better to trust to a Judiciary than to a Parliament to define the limits. Especially, the Federal Legislatures under the New Constitution, should not be invested with such powers as a Parliament composed of heterogeneous elements are not likely to view the question judicially. What is more, a decision after all by a lay body like the Legislature, where probably the Indian States' view may not prevail, is not likely to satisfy either the Federated State or the Federation. Matters of law should not be subjected to a democratic voting; if allowed, judicial sanity will be displaced by party opinions and autocracy, the will of the judiciary will be destroyed by the whim of the majority and the permanency of law and settled principles of equity by ill-tempered and intemperate opinions of the easily excited legislators. It is far

better to err with even a wrong Judiciary than be in the right with a temporarily good Legislature. If a proper Federal Court is to function at all, it should be armed with definite powers and placed in a stable position of independence and absolute detachment and sovereignty; then it is sure to be the Fort of Justice and Palladium of granted Constitutional Rights.

"A Law"—Does It include "Proclamation-Law" ?

Sec. 45 of the India Act provides for cases of the breakdown of the Constitutional Machinery. The Governor-General is authorised to declare that he will begin exercising such functions as stated in the Proclamation and assume to himself all or any powers exercisable by any Federal Body or Authority. The sub-clause (5) arms the Governor-General with power to assume to himself any power of the Federal Legislature to make laws.....and it is stated, 'any reference in this Act to Federal Acts, Federal Laws, or Acts or Laws of the Federal Legislature shall be construed as *including a reference to such a law*'. So the laws that may be made by the Governor-General during the time of "Government under Supercession" may also have to be within the legal limits.

A Safeguard against A Safeguard !

The Federal Court Breathes even during 'Government under Supercession'!

It was stated above that the Governor-General can take upon himself all the duties of any Federal authority and they may be sentenced to extinction! If that were so, which is the body that is to decide the nature of the Proclamation-Laws or the extent of their force in a Federated State? Fortunately in providing for safeguards in cases of failure of the Constitution, Judicial safeguards are there to preserve the Federal and State Sovereignty. The power of the Governor-General to assume the powers of the Federal Bodies does not to extend those exercised by the Federal Court and his power to assume any of the powers of the Federal

Court, to suspend either in whole or in part, the *operation of any provision of this Act relating to the Federal Court,* is expressly negatived under Section 45.

So the Federal Court's existence is guaranteed and it shall function as the final authority to decide on its legality or force in a Federated State. The discretion of the Governor-General in his framing laws during the Proclamation crisis has to be subordinate to the judicial will of the Federal Court. It is a great protection against interference during the excited times of Constitutional Impasse. The provision for the continuance of the Federal Court undisturbed is ensured for the continuance of the Federation and is indicative of the bonafides of the framers of the Act and their beliefs and conviction in a Federated India. Whatever may be done in British India and whatever may be the nature and expression of the Proclamation-Laws there, they shall not be applied in a Federated State with such ease, or such force as an independent tribunal is likely to sit in judgment over them.

Procedure for Reference—Appeal

Either the Federation or the Indian Ruler may refer to the Federal Court points of a Federal Law's applicability and extent of its applicability in an Indian State and it shall determine it.

No procedure has been prescribed for reference, but it is stated that in the exercise of its Original Jurisdiction, the Federal Court will decide the matter. Against its decision, appeal will lie with leave of the Federal Court or of His Majesty in Council to 'His Majesty in Council' under Sec. 208 (b), as a decision under Sec. 128 cannot in terms come under Sec. 208 (a).

CHAPTER X

FEDERAL DECISIONS

In India, Federal Law as such is yet to be born. The order of the Political Department of the Government of India in disputes between States and the Paramount Power can never have the flavour or sanction of Judge-made Law, nor can they have the imprimateur of a Court of Justice. Court, Procedure and Case-law have yet to develop. As stated elsewhere, the Federal Court in India is coming into form under peculiar circumstances with peculiar constituent units. The case of other Federal Countries may not be a good guide at all, as the constitutional ties between the component parts differ fundamentally from those in India, in character, force and contents. A great admixture of considerable sanity with a stern outlook and a high sense of impartiality are wanted in the Federal Judges. Above all, their knowledge of local conditions and constitutions and constitutional bondages should be very profound to evaluate properly the merits of the contending parties. However, certain marked tendencies of the decided cases in other countries similarly placed will not be without profit to us and a few of them may deserve our passing notice and a skeleton-study.

Subsidy

Provincial Legislatures have power to raise a subsidy by local taxation designed to promote the construction of a railway extending beyond the limits of the province but already authorised by statute. *Dou V. Black* 1875 L. R. 6 P. C. 272.

But it has no power to impose a duty of ten cents upon every exhibit filed in Court in any action pending therein.

If it does, it is ultravires. *Att. G. for Quebec V. Reed 10 App. Cas.* 141.

Direct Taxation

Direct taxation on commercial corporations are intravires of the powers of legislature in the provinces. *Bank of Toronto V. Lambe* 1887 12 App. Cas. 575. But a taxation of succession duty in respect of property situate outside the province upon the death of the owner within it, is ultravires the legislative power of the province. *Barlan V. The King* 1922 I. A. C. 215. *Woodsuff V. Att. G. for Ontario* 1908 A. C. 508.

Crown Lands

The provincial legislature cannot tax Crown Lands, but they have a power to impose a tax on the interest of a tenant in Crown lands held by him. *Smith V. Vermillion Hills Rural Council*, 1916 (2) A. C. 509.

Penalties

Under the Australian Commonwealth Act, a penalty can be imposed for the act of breaking the seals, whether on the high seas or elsewhere, which has been lawfully imposed on ship-goods in lieu of exacting payment of duties and entering an Australian port with the seals broken. The provision is not ultravires of the Act. *Peninsular and Oriental Steam Navigation Co., V. Kingston 1903 A. C. 471.*

Income Tax

The Dominion Income Tax Act can levy and collect tax on the salary of the Ministers of the Province. *Caron V. King* 1924 A. C. 999.

Death Duties

Under the British North American Act, a province is not entitled to impose taxation, payable on the death of a person

therein domiciled in respect of his personal property so situate. Personal property outside the province cannot be treated as within it by an application of the principle *mobilia sequntar personam.* That principle relates to the law governing devolution of personal property not to its local situation. If a provincial statute imposing succession duties makes the executor personally liable for the duties, the taxation is indirect and therefore invalid, *Alberta Provincial Treasurer V. Kerr* 1933 A. C. 710.

Indirect Taxation

An Act provided a remedy to avoid the glut in the market of fluid milk, but in its attempt to put into force the provisions, made scope for levying two kinds of *contributions*. These were held to be *taxes* and as they would tend to affect the price of commodities, they are indirect taxes and are ultravires the Provincial Legislatures. *Lower Mainland Dairy Products Sales Adjustment Committee V. Crystal Dairy* 1933 A. C. 168. P. C. But a tax on oil levied directly from the consumer is good. *Att. G. for British Columbia V. Kingcome Narigation Company.* 1934 A. C. 45=1933 W. N. 247.

Exemption from Taxation

A federal statute, which exempts buildings set apart for use of public worship of God ought to be adhered to, even though the place was taxed for a number of years without objection. *Victoria City Corporation V. Vancover Island Bishop* 1921. A. C. 384.

CHAPTER XI

FEDERAL DECISIONS *(Continued)*

Railways*

The Dominion Parliament has exclusive right to prescribe regulations for the construction, repair and alteration of railways and the Provincial Legislature has no power to regulate the structure of a ditch forming part of its authorised works. Provision prescribing the cleaning of the ditch and the removal of an obstruction are intravires of the Provincial Legislature. *Canadian Pacific Railway Co. V. Notre Dame De Bousecours Corporation 1899* A. C. 367. A provincial railway is not subject to the jurisdiction of the Board of Railway Commissioners of Canada in respect of its through traffic with a Federal railway. A provision to deal with such through traffic is ultravires. *Montreal City V. Montreal Street Ry.*, 1912 A. C. 333.

No provincial legislature can legislate that, unless a Federal Railway Company erects fences on their railway, it shall be responsible for cattle injured or killed thereon. It will be ultravires. *Madden V. Nelson and Fort Shepherd Railway* 1899 A. C. 626.

The Board of Railway Commissioners has powers to regulate the crossing by a Provincial Railway of a Dominion Railway. *Att. G. for Alberta V. Att. G. Canada* 1915 A. C. 363. Similarly a Provincial Railway Board has jurisdiction to make orders with reference to a provincial railway which crosses a

* Some general principles as enunciated by decided cases are stated here. For a detailed study refer to chapters *"Federal Court and Railway Tribunal" and "Railway Cases"*

Dominion Railway. *Hamilton V. Grimsby and Beamsville Ry. V. Att. G. for Ontario* 1916 (2) A. C. 583.

Provincial lands vested by a statute in a railway company which has been declared by a Dominion statute to be a work for the general advantage of Canada are subject to a statute of the province authorising the issue of crown grants so far as lands form part of the railway (as defined by section 2 of sub sec. 21 of the Railway Act.) *Wilson V. Esquimalt and Nanaimo Railway Company* 1922 I. A. A. C. 202.

There may be Federal Railways as opposed to State or Provincial Railways and they may be under a Board of the Commissioners created under the Act. A case of unjust discrimination arose when a complaint was presented that the Park Railway Company charged different rates between the residents of a certain ward in the city of Montreal and the residents of an outlying township of Notre. It was defended that it was made under the authority and powers conferred upon the Commissioners. In this case *City of Montreal V. Montreal Street Railway*, 1912 A. C. 333. the jurisdiction was not made to depend upon —in any way—on the character, nature or volume of the through traffic. Nor upon the question whether it is of such a kind as to confer special advantages upon Canada or upon two or more of its Provinces. If it should be justified and supported at all, it can be done only on the basis that it was incidental to the exercise by the Federal Legislature of the powers conferred upon it under the Act.....Is there a suggestion in the case that through traffic between the federal or local line has attained such dimensions to affect the body politic of the Dominion? It was held that the right to discriminate was not necessarily incidental and it was an unauthorised invasion of the rights of the Provincial Legislature.

Water Rights

Once when some public lands have been granted over by the Provincial to the Federal Government, the grant includes

the water rights incidental to such lands and it is not competent for the province to deal with them subsequently. *Burnard Power Co. Ltd. V. R.* 1911 A. C. 87.

Fishing Rights

Fishing regulations and restrictions are within the exclusive competence of the Dominion. *Att. G. for Dominion of Canada V. Att. G. for Provinces of Ontario, 1898 A. C. 700.* But the Dominion power of regulation must be exercised so as not to deprive the province or private persons of proprietary rights which they possess. *Att. G. for Canada V. Att. G. for Quebec.* 1921. 1. A. C. 413.

A Provincial Legislature is not competent to grant the exclusive right of fishing in either the tidal or the navigable non-tidal waters within the Railway-belt and this cannot come under civil rights of the province. *Att. G. for British Columbia V. Att. G. for Canada, 1914 A.C.*

Mines

A grant of Dominion lands does not include grant of precious metals contained therein, *Husdon Bay Company V. Att. G. for Canada,* 1929 A. C. 285.

Marriage

The jurisdiction of the Federal Legislature does not cover the whole field of validity of marriages. An Act by which it was proposed that every ceremony or form of marriage shall be valid everywhere in Canada, notwithstanding any differences in the religious faith of the persons and without regard to the religion of the celebrant, is ultravires of the Dominion Parliament. *Re-Marriage Legislation in Canada,* 1912 A.C. 680.

Federal Court—Treaties

Federal Legislation should confer jurisdiction on Federal Courts to cases arising under treaties. A question arose in 1891, at New Orleans *re:* the lynching of certain Italians. The Italian Government in its complaints appealed to the Treaty of 1871 between the United States and Italy but it seems to have been held that the Congress had not Courts to deal with offences in breach of that treaty. In his inaugural address (March 1909) President Taft referred to this and said that legislation was urgently needed to arm the Executive with power to secure protection in the State to foreign residents.

Colonial Courts—Treaty

The Colonial Courts were held to be competent to enquire into matters involving the construction of treaties or other Acts of State. *Walker V. Baird 1892 A. C. 491.*

CHAPTER XII

DECISIONS ON PRACTICE AND PROCEDURE

When a Full Bench gave a decision on a matter being referred to it by the Division Bench and an appeal was brought to Her Majesty in Council, it was held that the respondent without filing a cross appeal can object to the correctness of the answer given by the Full Bench on the question of law referred.[1]

Judge—To Consult Colleagues

The Chief Justice, alone and without the consent of the other judges, should not issue a rule altering the practice. It is illegal. In the India Act rules are to be made *with* the approval of the Governor-General by the Federal Court. *R. V. Wells* 1840 3 Moo. P. C. C. 216.

Exparte Judgments

Whether a judgment against an absentee party without service of the writ will be enforced by the Court of another country is question of Local Law. *Ashbury V. Fllis* 1893 A. C. 339.

Final

Any statute making a judgment of Court of Appeal "final" in certain matters, cannot infringe the prerogative of the Crown to allow further appeals as an *"act of grace."*. The word 'final' can apply only to rights of appeal given *under the Code*[2] and not to powers that lie beyond the Code.

1 *Phoobas Koonwar V. Valla Jogeshen Sahoy* 1876 L. R. P. 3 Ind. App. 7. P. C.

2 *Cushing V. Deputy* 1880–5 App. Case 409, *A. G. for Ontario V. A. G. for the Dominion* 1896 A.C. 348.

Judge

Misbehaviour. Obstructing his creditor from recovering debt due from him and his financial embarrassment were held sufficient to constitute misbehaviour justifying a removal. *Montague V. Ven Dieman's Lands, 1849* 6 Moo. P. C. C. 489.

A Judge can be removed only after giving him an opportunity of answering the charges brought against him and upon which the motion was founded. [3] Several acts of intemperate, and in some cases, illegal conduct committed *several years before* the presentation of the complaint cannot form a fair basis for removal of a Judge. Having regard to the lapse of time, the Judicial Committee cannot, sitting judicially, advise the Crown for removal of the Judge. [4]

Legislature and Power to take Action for Contempt

The privileges of the House of Commons in England belong to it by virtue of the *lex et consuetudo Parliament* which is a law peculiar to the United Kingdom. It is wrong to infer that every new legislature of the Colonies has such powers. *Doyle V. Falconer 1866 L. R. I. P. C. 328.*

A power to remove an obstructing member in the House or expelling one for disorderly behaviour in the House is a power vested in the Chair of the House for self-preservation of its dignity and better management of business. It ought not to be confused with the power to take action to punish for contempt which is purely a judicial power.

Indian Courts

By the Constitution of the Supreme Courts in India, the Judges for the purpose of the trial of an action sit as a jury as well as judges and the same weight has to be given to the verdict of a jury in this country in which the judge who tries the cause makes no objection. [5]

3 *Willis V. Gipps* 1846 5 Moo. P. C. C. 379

4 *Re Grenda and Sanderson* 1847 5 Moo. P. C. C. 38

5 *M. M. Casum Speracee V. Meeraa Ally Md. Shoostry 1854.* 8 Moo, P.C.C. 9.

There is no power in the Court of India, similar to that exercised by Courts of Equity or Common Law in England to dismiss a suit with liberty to bring a fresh suit for the same matter. Such power is limited to questions of form, misjoinder of parties, where a document has been rejected for not having a proper stamp and where there has been an improper valuation of a suit. [6]

The Nizam granting to the British Government a civil or criminal jurisdiction along the line of a railway within his Dominions cannot give authority for the British Court to arrest persons within the territory for offences, not committed on the Railway nor in any way connected with its administration. When there is no cession of territory by the Nizam, a notification by the Governor-General in Council was inoperative to give jurisdiction or to be a source of authority, in excess of that granted by the Nizam. [7]

A transfer of jurisdiction would not amount to a cession of British territory to a Native State, nor would it deprive the Crown of its territorial rights over the transferred districts or persons resident therein of their rights as British subjects. [8]

In cases against a State whose status is disputed, a Statement signed by the Secretary of State that the ruler is an independent Foreign Sovereign, is equivalent to a communication from the Crown and therefore conclusive and the Court will accept it without considering whether it is borne out by documents which are appended to it. [9]

6 *Watson V. Rajshaye 1869 13* Moo. Ind. App. 160.

7 *Muhammad Yusuf-ud-din V. Queen Empress 1897* L. R, 24 Ind. App. 137 P. C.

8 *Damodhar Gardhan V. Deoram Kanji* 1876 1-App. Case 332 P. C.

9 *Mighell V. Sultan of Johare* 1894 1 Q. B. 149. *The Gagara* 1919 P, 95 *Duff Development Coy.* 1923 1, Ch 385.

CHAPTER XIII

A TREATY

The word 'treaty' in legal as well as in common language is used only for the most solemn agreements between Independent Nations. A treaty is presumed to be a voluntary action on both sides.....All treaties are above the jurisdiction of ordinary law and failure to observe any of conditions can be met with only by the penalties provided therein.[1]

Independent States may enter into contracts with one another to accomplish purposes of common interest without in any way derogating from their complete sovereignty. Such contracts are called 'treaties'.

A Federal State is a perpetual union of several sovereign states based *first* upon a treaty between those states or upon some historical status, common to them all and secondly upon a Federal consitution accepted by their citizens.

As to what is a State or no, we shall not discuss here. The information of a responsible representative, in writing regarding the nature of a State is accepted by all as a conclusive answer to a question on the status of a State.[2]

Sovereignty of a State

It is the settled policy of the Court to take judicial notice of the status of any foreign Government. The information supplied

1 *Federal India.*—Haksar and Pannikar

2 1924 A. C. 797.

by a Secretary of State is always conclusive. A Soverign State is entitled to plead its sovereignty and it is exempt from jurisdiction of ordinary courts. The conditions of an agreement between His Majesty's Government and a Sovereign State have nothing to do with this matter. *Duff Development Company V. Gorernment of Kelan*, 1924 A. C. 797.

But the moot point remains who should be the contracting parties? Which sort of binding is constitutionally and legally enforceable? This question of a treaty between one state and another component elements of a Federation, one State with the Federation or *vice versa*, between the Federated State and the Paramount power, between the Federated State and any other Foreign Power has to be considered in several forms. Can a colony do it, independently, without reference to His Majesty's Government? Is there anything wrong, constitutionally in it, or is there anything faulty in statesmanship, if such is permitted? Views on this matter are not very decisive.

Markedly divergent views prevail on this matter, and they are likely to assume greater importance in the working of the Federal Constitution.

Lord Ripon's Dispatch

The following principles were laid down in 1894—in the Dispatch from *Lord Ripon* conveying the decision of the Imperial Government with regard to the resolutions arrived at by the representatives of the Self-Governing Colonies at the *Ottawa Conference.*

"Any agreement made, must be an agreement between *Her Majesty's Government and the Sovereign of a Foreign State*, and it was to Her Majesty's Government that the Foreign State would apply, in case any questions arise under the agreement. *To give the colonies power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and sovereign states and would*

be equal to the breaking up the Empire into a number of independent states, a result injurious, equally to the colonies and to the mother-country, and one that would be desired by neither party. The negotiations therefore between Her Majesty and the Foreign State must be *conducted by Her Majesty's representative at the Foreign Court* who would keep Her Majesty's Government informed of the progress of the discussion and seek instructions from them, as necessity arose. In order to give due help to negotiations, Her Majesty's representative should as a rule be assisted by a delegate appointed by the Colonial Government either as a plenipotentiary or in a subordinate capactiy as the circumstances might require. In all cases, before the plenipotentiaries are authorised to sign the treaty, the conditions laid down should be carefully examined by the Imperial Government and it is subject to the ratification by the Imperial Government".

Professor A. B. Keith's view on the matter has been subjected to an acute criticism by Sir P. S. Sivaswami Iyer. [3] The treaty-relationship between the Indian States and His Majesty is very finely imagined and portrayed in plain language, without much of the verbiage of constitutional law.

"The issue raised is whether the Indian States are in direct relationship with the Government of India or with His Majesty's Government. *It is contended* that though the Indian Princes now deal with the Governor-General in Council, it is *only because he is the agent and representative of His Majesty, the King Emperor* and not because *he is the executive head of the Government of India. The theory of a vinculum juries between the Indian States or Princes and the British Sovereign, otherwise than in his capacity of the Sovereign of British India, has no basis in Constitutional Law.*

This subtle point has been overlooked by many constitutional writers on Indian problems and even such an eminent authority like Professor A. B. Keith has to be pulled up.

3 *Indian Constitutional Problems* p. 210.

'It is quite possible', Sir Sivaswami Iyer writes, 'to distinguish between the Viceroy, as the representative of the British Crown and of the Imperial Government and the Governor-General as the Executive Head of the Government of British India. The two capacities are at present merged in the same individual and as the Government of India is responsible to the Secretary of State *and to the Parliament*, it is unnecessary to differentiate between the two capacities. But when responsible Government is introduced, the distinction between the two capacities emerge into notice. Such a distinction is not unknown to constitutional law *but as regards the question with whom the Princes have entered into treaties, it is not correct to say that the treaties were entered into with the Crown irrespective of British India.* The power of making treaties is a prerogative of the Crown. The treaties were entered into either with the East India Company in their sovereign capacity, acting *on behalf of the* Crown. *In either case, the Crown acted* not in a personal capacity or in the capacity of Sovereign of England but *in the capacity of the Ruler of British India.* The result is exactly what would have been the case if the treaties had been entered into with the Moghul Emperor of Delhi.....

The treaties do not create a mere personal right or obligation but impose obligations on the rulers for the time being of the Indian States *in favour of the authorities for the time being in charge of the Government of India.* Under the Government of India Act (Old—so also in the New) the Indian Legislature has no right to legislate for the territories, outside British India. But the Act contemplates the existence of political relations between the Executive Government of British India and the Indian States. The Executive Government of British India is fully empowered to transact business with the Indian States. Sec. 8 (c) ii of 1935 act also confers powers on matters stated in the Instrument of Accession.

The question may perhaps be raised whether Indian Princes and Indian States can be brought under the term "Foreign Princes

or States"? Obviously they must be included within this exception for they are *foreign* to British India. Otherwise it would follow that while legislation affecting the relations of the Government of India with Foreign Princes or States is forbidden, the relations of the Government of India with Indian Princes or States could be effected by measures introduced in the Indian Legislature, without the sanction of the Governor-General."

"The contention that the sovereign of a country who enters into a treaty does so in his personal capacity and not as the sovereign of that country is too absurd to be maintained in the twentieth Century. Supposing the people of England chose to set up a Republic in place of the Constitutional Monarchy, it cannot be contended that the treaties with the monarch would cease to be enforceable. Or again let us suppose that the Queen of England was a despotic sovereign at the time of the treaties and she subsequently granted a Parliamentary Constitution to her people. Could it be said that the treaties would be unenforceable, because they were entered into with the British Sovereign in his capacity as the Sovereign of United Kingdom divorced from his sovereignty over his Indian territories. The matters governed by the treaty relate to persons and things in India and arise out of the relations of the Princes with the Sovereign of British India and it would be an unthinkable constitutional absurdity that the right to enforce the treaties should rest not in the authorities for the time being charged with the administration of India, but in some other authority. The view that I have taken here differs from that expressed by Professor A. B. Keith in his *Constitutional Administration and Laws of the British Empire* p. 259-61 and in his *Responsible Government in the Dominions* p. 807."

"I regret I am obliged to differ with such an eminent constitutionalist. But it seems to me that his *view is based on a fundamental misconception of the nature of the treaties* entered into between the Indian States and the Government of India. The crucial question is with whom were the treaties entered

into by the Indian States? Was it with the British Crown as representing the paramount power in India or otherwise? If it was with the British Government, was there any undertaking, express or implied not to introduce such changes in the administration or constitution as might be required from time to time? It is not a case of transfer of rights or obligations by a party to a treaty but the case of a party developing a constitutional, in the place of a bureaucratic, system".

That the above view taken by Sir P. S. Sivaswami Iyer is correct, is evidenced by the wording in Sec. 2 of the Act (of 1935) "all rights authority and jurisdiction hereto before belonging to His Majesty the King *Emperor of India*....." So, as *Emperor of India*, certain rights, etc, belong to him and *not* as King of England. Again any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall, in India, if not exercised by His Majesty, be exercised *only* by or by persons acting under the authority of His Majesty's *representative for those functions of* the Crown. Sec. 3 says that the Governor-General is the Representative as regards relationship with Indian States.

The subject of "external affairs" has been put down in item No. 3. of the Federal Legislative List under the VII Schedule of the Government of India Act and as such, the Federal Executive alone has jurisdiction to deal with 'external affairs, implementing treaties and agreements with other Countries.' The Provincial Legislative List has *no* corresponding provision. Even in the Instrument of Accession, the rights between the Federated State and the Federal State should get defined and then there won't be any necessity for any other treaty. The future will be only enforcing those clauses. If any question of interpretation arises, the Federal Court will decide it.

By the several Instruments of Accession, the Indian States get into a 'political contract' with the Federal State. As such, there will not be any necessity for an Inter-State treaty, say

between Travancore and Cochin, or Cochin and the Bombay Government. Things that are intact now will find a place or if the Indian States want to have such a power to enter into foreign relationship, it is up to them to have the same entered in the Instruments. In fact contingencies are likely to arise. There may be States say A. B. C. *not* entering into the Federation. Can any one of the A. B. C. States enter into a treaty with D. E. F. States or any of the three which have not entered into the Federation already? I believe these are matters that ought to be decided in the Instruments of Accession. It is likely that some States may not enter Federation at all for a time. Suppose a necessity arises for a treaty relationship or for a settlement of disputes with them. Should the Federal Unit alone which is likely to be interested in the settlement enter into an understanding with that Non-Federal State or should the Federal State *as such*, enter into relationship with that Non-Federal State? The only safe answer is that the Instruments of Accession and their respective clauses decide the former point while the latter depends upon its unencumbered position and status. What it can do now eg. before the start of the Federation, it can do after that, as it has not joined it and it is eligible to be as free as it was." Section 106 clearly enacts" that by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries, the *Federal Legislature shall not have any power to make any law*, for any province except with the previous consent of the Governor or for a Federated State except with the previous consent of the Ruler thereof. Sec. 125 provides for agreements between the Governor-General and the Ruler of a Federated State hereafter, provided there is scope for it in the Instrument of Accession.

CHAPTER XIV

INTERNATIONAL LAW

A constant question will be the application of particular laws to particular individuals placed under particular circumstances. 'Each branch of law is studded with difficulties arising out of unexpected and queer incidents. The nationality of the person, his Native Law as compared with the Law of the State in which he lives, his obligations arising out of contract and social relations are so diversified in nature, that nothing but a brief notice is possible here and an extensive treatment has to be reserved to an exclusive treatise on the subject.

Law of a Conquered Territory

How it affects Englishmen in the Colonies—"The Law and Legislative Government of every Dominion equally affect all persons and all property within the limits thereof and they are the guiding decisions for all questions which arise there.....

It is absurd that in the Colonies they should carry all the Laws of England with them; they carry only such as are applicable to their situation. There was a question whether the statute of Charitable Uses operated on the Island of Nevies. It was decided that it did not and no laws but such as were applicable to their condition *unless expressly enacted* "Lord Mansfield *C. J. Campbell V. Hall* 1774 1 Cowp. 204. But in *Kielley V. Carson* 1842. Moo P. C. C. 63. Parke B. stated that settlers from the mother country to a colony *not conquered,* carry with them such portion of the Common and Statute law as are *applicable to their new situation.*

Laws of the Natives

Natives are sometimes ill advanced in their legal conception. It would be absurd to import English ideas there. In some places, the law of the Natives is more definite. It can be enforced *Re.—Southern Rhodesia,* 1919. A. C. 211.

Territory-Conquest-Annexation

A conquered territory forms immediately a part of the King's dominions *The Flotina* 1814. 1. Dods 450. A conquest by a chartered company is deemed to be made on behalf of the Crown. No proclamation is necessary to declare its annexation. A manifestation of the Crown's intentions by an Order in Council is constitutionally sufficient. *Re. Southern Rhodesia,* 1919. A. C. 211.

A Proclamation of laws does not authorise making of new laws but only transplants to the new territories, such laws as are already available in the other parts of the Colony. *Spring V. Sigeau,* 1897 A. C. 238.

Laws of a Conquered Territory

They continue to be in force unless they are altered by the conqueror.

Even the King who is subordinate to the authority in Parliament cannot make any new change contrary to fundamental principles. He cannot exempt an inhabitant from that particular dominion or from the law of trade. *Campbell V. Hall 1774* 1 Coup 204. *Att. G. for Canada V. Giltula* 1906. A. C. 542.

Law of Domicile

An Englishwoman who had taken the steps prescribed by the French Code had nevertheless on the evidence acquired a French domicile of choice and that the court would apply the law of France in administering her estate.—*Annesley Davidson V. Annesley.*

International Law—War

If a state's privilege to own its trading flag "as a free and independent state", is recognised under a treaty, a Proclamation by a protecting power on its own behalf would not of itself put the State in a state of war. *Ionion Ships*, 1855. 2 Ecc. and Ad. 212. It is also referred to in *R. V. Crave* 1910. 2. K. B. 576.

Insolvency—Private International Law

Upon a foreign court adjudicating a person an insolvent, the only property in British India which vests in the Receiver by virtue of private international law is such movable property as the insolvent was free to assign to the receiver on the date of adjudication. The adjudication was by the District Court of Secunderabad and an attachment of a decree in favour of the Insolvent was effected by the Madras High Court. It was held that the insolvency did not affect the rights of the attaching decree holder *Anantapadmanabhaswami V. O. R. Secunderabad*, 1933 A. C. 394.

CHAPTER XV

COURT, GOVERNOR AND CROWN

The Governor of a Colony in ordinary cases cannot be regarded as a person with general sovereign powers. His authority is limited to the terms of the commission and is derived from the powers either expressly or impliedly granted. It is *within the province of the Municipal courts to determine* whether any act done by a Governor is within the limits of his authority and therefore, an Act of State. Once it is established that the particular act in question is really an Act of State policy under the authority of the Crown, the defence is complete and the courts can take no further cognizance of it. *Musgrave V. Pulido* 1879. 5 App. Cas. 102.

The prerogative of the Governor can be also limited and may be directed to be exercised according to *inter alia* such laws and ordinances as are and shall be in force in the said colony. *Commercial Cable Co. V. Newfoundland,* 1916 A. C. 610.

Powers of the Governor

He can give assent to an Act in which he is personally interested. *Philips V. Eyre* 1870. L. R. 6. Q. B. 1. The prerogative power of the Governor is always subject to the restrictions imposed by the constitutional practice of the colony *Commercial Cable Co. V. Newfoundland Government* 1916(2) A. C. 610. Even in matters where specified discretion is given to him to move on sufficient grounds shown to his satisfaction, he ought to exercise the same after due enquiry and except in emergent cases, a fair opportunity should be given to the party affected, to rebut the charge. *De vertefuil V. Knaggs* 1918 A.C. 557.

An action will lie against a Governor in the Courts of the Colony while he is such a Governor for a cause of action unconnected with his official capacity. Though judgment may be given against such a Governor, his person is not liable to be taken in execution. *Hill V. Bigge* 1841 3. Moo. P. C. C. 465.

The Crown and its Prerogative

The prerogative of the Crown runs to colonies unless the Local Law or Statute restricts it. There is no Constitutional incongruity in an officer of the Crown receiving his appointment at the hands of a Governing body which has no powers and no functions, except as representative of the Crown. *Maritime Bank of Canada V. New Brunswick,* 1892 A. C. 437.

It can create a Legislature in the colony which is subordinate to Parliament but with supreme power within the limits of colony for the Government and its inhabitants.

But it is a doubtful question whether it can confer 'power of arrest' for contempt committed out of the Legislative House, an authority not incidental to it by law. *Kielly V. Carson* 1842 4 Moo. P. C. C. 63.

Exclusion of the prerogative of the crown in any matter can be accomplished only by an Imperial Statute. *Nadan V. The King,* 1926 A. C. 482. It was also held that it was beyond the competence of the Dominion Legislature and was inoperative. The matter again came up in *British Coal Corporation V. The King, 1935 A. C. 500* where it was reconsidered. "Outside all statutory limits, a discretion to the King in Council, to grant special leave to appeal from a Colonial Court in Council, always existed. It was described as the *prerogative right*"

Crown—Interpretation of Statutes

No provision in any act is to affect the Crown, unless it is stated so expressly. In the case of debts due to the Crown,

the act should be interpreted as though it enacted that the priority should not be disturbed. Two debts therefore would run *pari passu* as may be claimed by the Province. There is only one Crown but by legislation assented to by the Crown, revenue and property vested in a Province. There are two separate statutory purses, in each the ingathering and expending authority are different. *Att. G. for Quebec V. Att. G. for Canada*, 1932 A. C. 514.

CHAPTER XVI

APPEALS TO THE PRIVY COUNCIL

"The right of appeal from Dominion and Colonial Courts to the Judicial Committee of the Privy Council is an important, though not, an essential element in the legal structure of the Empire. Technically it forms a part of the royal prerogative resting upon the medieval theory that there is an ultimate reserve of justice vested in the King, which enables him to correct the errors of Law. In another form this theory of the royal prerogative was the historical foundation of the Court of Chancery and the rules of equity in English Jurisprudence. ‡

Any Special Leave for Appeal from Decisions of the Federal Court under the India Act?

Section 208 of the India Act says that an appeal shall be presented to His Majesty in Council in some cases mentioned in sub-clause(a) *without leave* and in other cases by *leave of the Federal Court or of His Majesty in Council.*

The question arises, *apart from this leave,* is any discretion reserved to the King in Council to grant special leave, or is there any such prerogative right, as the King is the fountain of justice? The question can be answered by a reference to the Act itself and following the method of argument of Viscount Sankey L. C. in 1935 A. C. 500. No doubt the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection

‡H. A. Smith. *Canada and Worlds Politics* quoted in the *Present Judicial Status of the British Dominions in International Law*—by P. J. Noel Baker.

with Dominion or Colonial matters, that principle involves that if the limitation of the prerogative is by a Dominion or Colonial Act, not only must that Act itself deal with the prerogative either by express terms or by necessary intendment but *it must be the Act of a Dominion or Colonial Legislature* which has been endowed with the requisite power by an *Imperial Act* likewise giving the power by express terms or by necessary intendment.

A reading of the India Act—Schedule VII Clause 53, states that the Federal Legislature has power to legislate on matters relating to Courts. But the jurisdiction over the Federal Courts is *excepted* and the Federal legislature has no jurisdiction over it. As it is, the Federal legislature may legislate on matters relating to the High Court and other courts.

So the India Act has not expressly taken away the powers or the prerogative of the Crown re: special leave and given them to be controlled by the Federal Legislature. In fact the Federal Legislature's right to legislate on the matter is negatived. A reading of the Commonwealth Act of Australia would show that it was invested with power to alter or amend the provisions of the Act relating to the Prerogative Appeals. A similar provision is given in the South African Constitution. But the India Act is the other way. So, the inevitable conclusion based on the arguments adopted in the *British Coal Corporation V. The King* 1935 A. C. 500 is, that the prerogative of the Crown to grant special leave is intact (in case of appeals from the Federal Court) and the power to regulate or prohibit this type of appeal should be held as *not* having been vested in the Federal Legislature.

Appeals

Appeals as Provided in the Various Constitutions

Canada

A. Provincial Court

1. Appeals lie by right from every *provincial court* to the Privy Council and also in every case, of course, by special leave.

2. Further, the Privy Council can grant Special Leave to appeal from the decision of the humblest Court in the Provinces.

B. Dominion Supreme Court

No appeal lies as of right but an appeal lies by Special Leave in every case, save as regards criminal cases.

Commonwealth of Australia

A. State Supreme Courts

Appeals lie by right and by *special* leave from all the *State Supreme Courts* and by *special leave* from inferior courts.

B. Commonwealth High Courts

Appeal lies only by *special leave* and in certain instances all appeals are prohibited, save by the permission of the Court itself *viz* in cases involving the question of the rights *interse* of the Commonwealth and the States or any two or more States.

Union of South Africa

Right to grant *Special Leave* is apparently intended to be abolished save as regards the Appellate-Division of the Supreme Court, though the case of the inferior Courts which are not divisions of the Supreme Court, seems to be overlooked.

Judicial Committee

Right to Appeal

A right of appeal is a matter of Substance and not a matter of Procedure. It cannot be taken away, unless by express words the same is intended. It will avail in favour of a Suit that was pending when the act was passed.[1]

1 *Colonial Sugar Refining Company V. Irwing* 1905 A. C. 369.

No Appeals in Certain Cases

The Judicial Committee has no jurisdiction to entertain appeals against awards without special reference to them by the Crown.[2] Nor can it hear appeals against Judgments in Election Petitions.

Although the prerogative of the Crown in Election Cases cannot be taken away except by express words, yet the fair construction of the Act and the previous legislation is that it was the intention of the legislation under that Act which was assented to by the Crown, to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final. No appeal lies in consequence.[2a]

Where the Supreme Court of a Colony has acted under a special reference made to it, under an agreement between the parties, an appeal does not lie to the Privy Council.[3] Special Commission appointed by the Viceroy to enquire into any matter can in no sense be a *'Court'* and leave to appeal from that judgment cannot be granted.[4] The powers of a political Agent are purely political and his jurisdiction is political, not judicial. No appeal lies therefore against his Judgment to the Privy Council.[5]

Special Leave

The General rule is special leave should be granted only in cases of gravity, involving matter of public interest or some important question of law or affecting property of considerable amount or where the case is otherwise, of some public importance of a very substantial character,[6] If in every case special leave is granted, it would be nothing less than, a miscarriage of justice,

2 *Re. Surat Nawab* 1854. I, 9. Moo. P. C. C. 88.

2a *Theberge V. Laudry* 1876. 2 App. Case 102.

3 *A. G. of Novo Scotta V. Gregory* 1886. 11 App. Case 229.

4 *Madhava Singh V. Secty. of State for India* 1904. L.R. 31. Ind. App. 239. p.c.

5 *Hemchand and Devchand V. Asam Sakarlal Cholamlal* 1906 A. C. 212.

6 *Prince V. Gagnon* 1872. 8. App. Case 103 p. c.

if their Lordships were to impose on the respondents a further hearing of the case with all the expenses attendant upon an appeal to His Majesty in Council, after there have been three decisions in the Canadian Courts, the final decision being that of the Supreme Court of the Dominion which is entitled to every confidence on the part of the Canadian People.[7]

Lord Macnaughten preferred to follow these general principles in the first case that came up from Australia ; [8] and said 'The High Court (of Australia) occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it is a matter of right to any tribunal in the Empire. There can be no appeal at all unless His Majesty by virtue of his Royal prerogative thinks fit to grant special leave to appeal to Himself in Council. In certain cases, touching the constitution of the Commonwealth, the Royal prerogative has been waived. In all other cases it seems to their Lordships that applications for special leave to appeal from the High Court ought to be treated in the manner as applications for special leave to appeal from the Supreme Court of Canada, an equally just and independent tribunal'. The same principle too will have to apply in the cases of applications for the special leave from India for filing appeals.

Special Leave is not generally granted if the question does not involve either a far reaching question of law or matters of dominant public importance, but involves only an interpretation of the terms of an agreement.[9] Even though the interpretation of a document involved in the matter is of great importance to the parties concerned, if it does not involve public importance, leave ought not to be granted.[9a]

7 *Clergue V. Murray.* 1903 A. C. 521—*Canadian Pacific Railway V. Blani* 1904 A. C. 453.

8 *Daily Telegraph V. M. Claughtin* 1904 A. C. 776.

9 *Albrigaht V. Hydro Electric Power Commission of Ontario* 1923 A. C. 167

9a *Wilfiley Ore Concentrator Syndicate V. Guthridge* 1906 A. C. 548.

A change in procedure during appeal relating to time for presentation of appeals is a good cause for granting special leave.[9b]

If leave is granted unduly, the proper course is for the other party to come before the Privy Council, before any expense is incurred and apply for the dismissal of the appeal. If such an application is delayed till the hearing of the appeal, the application will be granted without costs.[10]

If an appeal is admitted without jurisdiction (money value of subject matter being low) it could not be heard.[10a]

Only the court that is authorised by the Act can grant leave to appeal.[11] Even if an appellant is allowed to come before the Judicial Committee without first going to an intervening tribunal, the Lordships of the Privy Council desire to state that the leave so given cannot have the effect of placing the appellant in any better position than he would have been in, if he had followed usual course and has a decision against him by the Governor in Council.[12]

An order refusing to grant leave should state the grounds of such refusal.[13]

Leave to Appeal

A Provincial Act was passed limiting the right of appeal to causes where the sum in dispute was not less than a particular amount. It is true that this sets up a restriction on the right of appeal by a citizen and also stands against the prerogative of the Crown. The King has no power to deprive the subject of any of his rights but the King acting with other branches of the Legislature, as one of the branches of the Legislature, has the

9b *Ghose V. Ensuff* 37, L. J. P. C. 16 P C.

10 *Sauvageau V. Gauthier* 1874 L. R. 5 P. C. 494.

10a *Radha Krishnan Das V. Rai Krishna Chand* 1901 L. R. 28 App. 182 P. C.

11 *East India Co. V. Syed Ally* 1827.7 Moo. Ind. App. 555.

12 *Hemchand V. Azam Sakarlal* 1906 A. C. 212

13 *Venganat Swaroopathil V. Cherakunnath Nambiyathan* 1906 L. R. 33. Ind. App. 67.

power of depriving of any of his subjects, in any of the countries under his dominions, or any of his dominions, of any of his rights.[14]

A decree directing defendant to account was held to be final and leave to appeal can be granted.[15] A failure to record reasons in the order granting a review is not a ground for granting leave to appeal.[16]

A question however important, if it is depending upon the construction of a statute, leave to appeal is not granted.[17] A question of procedure which was peculiarly within the province of the judges cannot form basis for getting leave.[17a]

If under the Act, a certificate is necessary and if it is not granted, appeal is not competent.[18]

Judicial Committee

Criminal

It is only in very peculiar circumstances such as, where the rights of the Crown are concerned or when they involve questions of great importance and where the proceedings are substantially more of civil than of a criminal character, that appeals can be allowed in criminal proceedings.[19] Leave to Appeal is granted only in special circumstances, such as where a case raises questions of great and general importance in the administration of justice.[20] Even though justice has not been done in the court below, leave ought to be refused on the ground that such a course might be detrimental to the general administration of criminal justice in Her Majesty's Colonial and foreign possessions.[21] It may be granted in cases of great impor-

14 *Cullivet V. Aylwin* 1832, 2 Knapp 72

15 *Rahim Hilibhoy V Turner* 1890 L. R. 18 App. 6 P. C.

16 *Thakur Shankar V. Balwant Singh* L. R. 27 Indian App. 79 P. C.

17 *Whittaker V. Durban Corporation.* 1920 W. N. 278.

17-a *Att. G. for Ontario V. Daly* 1924 A. C. 1011.

18 *Minister for Trading Concerns for Western Australia V. Amalgamated Society of Engineers* 1923 A. C. 170.

19 *Falkland Islands V. R.* 1683. 1 Moo. P. C. C N. S. 299.

20 *R. V. Bertrand* 1867 L. R. 1 P. C 250.

21 *R. V. Jokkissen Mookerjee* 1862 1 Moo. P. C. C. N. 272.

tance. Unless clear departure from the requirements of justice is alleged to have taken place, leave to appeal will not be given.[22] *Generally, review of Criminal Proceedings will not be permitted* unless there is a complete disregard of all forms of legal process and violation of principles of natural justice and substantial injustice had followed.[23] But a violation of a technical rule alone will not be a ground for granting leave.[24] If a conviction is not warranted by facts and if there is a serious miscarriage of justice, the leave is given.[25]

The exercise of this privilege and prerogative of granting leave to appeal is to be cautiously admitted and is regulated by consideration of circumstances and consequences. It is granted in special circumstances where a case raises questions of great and general importance in the administration of justice.[26]

A conviction on wholly inadmissible evidence gives a reason for allowing leave for an appeal.[27]

A conviction can be allowed to stand on admission of a voluntary confession, coupled with evidence of other circumstances.[28]

When an appeal involves the construction of a Colonial Statute on which the interest of a large class in the Colony depends, leave is granted.[29] The refusal to hear a counsel is a good ground for granting leave.[30]

Sec. 295 (2) of the India Act preserves intact the right of His Majesty to grant pardons, reprieves, respites or remissions of punishment.

22 *Re Harvey* 1840. 3 Moo. P. C. C. 148

23 *Re Dillet* 1887 12 App. Case 459. *Rice V. R* 1885 10 App. Case 625.

24 *Dinizulu V. A. G. of Zululand* 61, L. T. 740

25 *Ex. P. Deeming* 1892 A. C. 422. 1 *Exp. Carew* 1897 A C. 719. *Armstrong* V. R. 1918 30 T. L. R. 215. *Lamier V. R.* 1914 A. C. 221.

26 *R. V. Bertrand* 1867 L. R. 1 P. C. 520.

27 *Vaithianatha Pillai V. King.* 1973 L. R. 40 Ind. App. 193.

28 *Ibrahim V. R.* 1924 A. C. 599.

29 *Brown V. Mclanghan* 1870 L. R. 3 P. C. 458

30 *Patnelli V. Heddle* 1852 8 Moo. P. C. C. 41

CHAPTER XVII

VALUE OF THE SUBJECT MATTER IN DISPUTE FOR APPEALS

In estimating the money value of the property in dispute, regard is generally had to the whole subject matter involved in the suit and *not* to the value of a fractional part of the property sought to be recovered. [1] Again the correct course is to look at the judgment as it affects the interest of the party who is prejudiced by it and who seeks to relieve himself from it by an appeal. [2] The court will allow an appeal where the amount in dispute was *originally* of sufficient value. [3] Even in the lower court if the value of the property has been put down low to defraud the revenue laws, the Judicial Committee will allow leave if really the property is worth the scheduled value. [4] Again, the original demand and value of the subject matter might have been restricted, owing to the jurisdiction of the Court in which the suit was first filed. But if really the subject matter exceeds the necessary value, leave will be granted. [5] *Profits*, if demanded in the plaint should be taken into account when assessing the value of the subject matter of the dispute. [6] *Interest*, if granted under

1 *Ameena Khatoor V. Radabenod* 1859, 12 Moo. P.C. C. 470

2 *Macferlane V. Leclaire* 1862, 15 Moo. P. C. C. 181.

3 *Pranath Roy V. Swarnamoyee* 1859, 7 Moo. 1 App. 553

4 *Mohanlal V. Beebee Doss* 1861, 8 Moo. Ind. App. 492

5 *M. J. Yettappa Naicker V. Venkateswara Yettia* 1865 L. R. 1 P. C. 1. 10 Moo. 1 A. 313

6 *Moideen Hadjiar V. Pichey* 1893 A. C. 193

decree appealed against should be calculated in fixing the value of the subject matter in dispute.[7]

Costs given in the decree cannot be taken into account in estimating the value of the subject matter.[8]

Subject matter in Appeal was the share claimed by appellant and it was found that the High Court wrongly certified the appeal on the basis that the subject matter was the amount of the decree.[8-a]

Where the claim on a *counter claim* is below the appealable amount, an appeal will nevertheless lie if the whole amount of the claim in the action exceeds that amount. If the amount involved is below the limit, no leave will be granted.[9] But consolidation cannot be permitted of the value of two suits for the purpose of filing an appeal.[10]

Below Value—Still Leave Granted

Public importance of the question is a good basis for granting leave, even if the value is below that prescribed limit.[11] When there are many suits pending, depending on a decision of the case, leave can be granted to the latter.[12]

7 *Boswell V. Kilborn* 1859, 12. Moo. P. C. C 467
Sutteschunder V. Guenschender 13 Moo. P. C. C. 469
Gooroopershad Khoond V Juggust Chunder 13 Moo. P. C. C. 472
Bank of N. S. Wales V. Owston 1879 4 App. Case 270

8 *Doorga Doss Choudry V. Ramanatha Choudry* 1860, 8. Moo. Ind. App. 262
Nilmadhub Doss V. Bishumber Doss 1869 13 Moo. Ind. App. 85

8-a *Radha Kunwar V. Restti Singh* 1916 L. R. 43 Ind, App. 187 P. C.
Manley V. Palache 1895, 73 L. T. 98

9 *Radakrishna Ayyar V. Swaminatha Ayyar* 1929 L. R. 48 Ind. App. 31 P.C.

10 *M. M. Ubdollah V. Mootechand* 1837 1 Moo. Ind App. 363

11 *Lindo V. Boorett* 1856 9 Moo. P. C. C. 456
Sumbhoolall V. Surat 1859 8 Moo. Ind. Appl.

12 *Joykissen Mookerjee V. East Burwan* 1860 8 Moo. Ind App. 265
Ko Khine V. Snadden 1868 L. R. 2 P. C. 50

CHAPTER XVIII

ENFORCEMENT OF FEDERAL DECISIONS

The merit of a Court is not in its judgments but in its capacity to enforce its decrees and do reparation to the injured party. A decision should not be allowed to be circumvented by Executive Acts. The history of the British relationship with Indian States has not been altogether unblemished and gives room for misgiving. Legal decisions eg. *Keshub Mahajan's Case* which decided that Mayurbhanj was a foreign territory and *Yusaf Uddins Case* which limited the authority of the Government of India in lands ceded for railway purposes alone, were easily circumvented by executive acts which impliedly set aside the orders of the civil courts. The Federal Judiciary should be the guardian of the rights of the minorities and then alone the Federal Structures will get automatically fortified.

Sec. 210 of the India Act enacts that all authorities, civil and judicial, throughout the Federation shall act in aid of the Federal Court. All orders passed by the Federal Court shall be enforceable by all courts and authorities in every part of British India as if they were orders duly made by the highest court exercising the civil or criminal jurisdiction, as the case may be, in that part.

Defiance of Federal Court's orders are likely to be dealt with in the way, disobedience to the orders of other courts are handled. It has powers to pass orders for contempt of court too and as such the hand of the Federal Judiciary is long enough to protect itself.

In the United States, every court has got an officer called United States Marshal, whose duty it is to carry out the writs, judgments and orders, of arresting persons, levying execution, putting persons in possession and so forth. In the beginning stages in India, a large ministerial establishment is unnecessary but as work increases, there will be necessity to appoint Federal Court officers for all duties separately.

CHAPTER XIX

THE FEDERAL COURT AND THE RAILWAY TRIBUNAL

Composition of the Railway Tribunal

The framers of the Act have conceived a very good plan to solve the troubles in Railway communications and administration. They have chosen an expedient which combines judicial determination with business principles. In cases of appeals from a decision arrived at by that expedient, they have placed the absolute judicial body, the Federal Court, to have the final say on the matter.

This idea of having a separate Railway Tribunal of such a composition is calculated to infuse confidence in the minds of business men in the decisions of the first court. Bare legal brains *alone* were probably thought not quite sufficient to decide disputes of a technical character.

Personnel

The Tribunal is to consist of a President and two other persons to be selected to act in each case by the Governor-General in his discretion, from a panel of eight persons appointed by him in his discretion being *persons with railway, administrative or business experience.*

The President shall be one of the Judges of the Federal Court appointed after consultation with the Chief Justice of India. The appointment is by the Governor-General for a period of *not less than* five years as may be specified in the order of appointment. He may be eligible for re-appointment for a

further period of five years or any less period. *But all this time, he should be a judge of the* Federal Court. If he loses that place, he ceases *ipso facto* to be the President of the Railway Tribunal. Vacancy during the temporary inability of the President will be filled up by the Governor-General from among other judges of the Federal Court after like consultation with the Chief Justice.

It is evident therefore that the members are put on the Tribunal for their technical knowledge of business administration and railways and the presence of the President, a Judge of the Federal Court is contemplated to give it the full force and majesty of a Judicial Tribunal.

In the Australian Constitution Act, there is a body called the Inter-States Commission. The Act makes no reference to the qualifications of the members that are to compose it. Possibly rules framed thereunder have fixed them. But the Indian Constitution has fixed the essential nature of the qualification and composition of the Railway Tribunal, which is no other than a Federal Railway Judiciary, intended to decide disputes among the Constituent Members of the Federation. The ties between the Federal Court and this Tribunal are very many and hence the Constitution of the Railway Tribunal is noticed here.

Jurisdiction

Cases for its decision arise out of the failure of the obligations between the members of the Federation. It may be due to setting up of hostile titles or probably an assertion or denial of a liability, rightly or wrongly, by one or the other. Sec. 193 of the India Act would say—

(i) it shall be the duty of the Federal Railway Authority and every Federated State to exercise their powers in relations with which they are respectively concerned.

(ii) to afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from those railways including the receiving, forwarding and delivering of *through traffic at through rates.*

(iii) to secure that there shall be, between one railway system and another, no unfair discrimination by the granting of undue preferences or otherwise and no unfair or uneconomic competition.

(iv) if the Railway Authority in the exercise of any of executive authority of the Federation in relation to interchange of traffic or maximum or minimum rates and fares of station or service terminal charges give any direction to a Federated State, the State may complain that the discretion discriminates unfairly against the railways of the State or imposes on the State an obligation to afford facilities which are not in the circumstances reasonable.

(v) the Federal Railway Authority or a Federated State may complain and object (as per rules to be framed under Sec. 195 (1) on the ground that the carrying out of the proposal for constructing a railway, will result in unfair and uneconomic competition with a Federal or State Railway as they may be. The objection should be made to the Governor-General who will refer the same to the Federal Tribunal.

Besides, Sec. 181 (3) enacts that the Federal Government or its officers shall perform in regard to the construction, equipment and operation of railway such functions for securing the safety both of members of the public and of persons operating the railways including the holding of enquiries into the causes of accidents.

The above is a fairly good catalogue of the mutual obligations of the Federal and State Railway Authorities. A non-observance of any of these has to be quickly decided either way and it cannot be treated as a regular civil litigation with its inevitable delay and probably its unbearable loss of money and time. The Railway Tribunal is exclusive for Railway cases and as such expedition and easy reparation are possible. No other Court shall have jurisdiction with respect to any of the above matter—Sec. 196 (7).

Orders, Practice and Fees

Tribunal may pass interim and final orders. It may vary or discharge an order or direction of the Indian Railway Authority. It may order payment of compensation, damages and costs. It has jurisdiction to demand production of documents and summon witnesses to apper before it.

The orders ought to be given effect to and executed by the Authority of every Federated State, by every person or authority who can give effect to it.

The President may with the approval of the Governor-General in his discretion make rules regulating the practice and procedure of the Tribunal and fees to be taken in proceedings before it.

The Federal Court—Final Appellate Tribunal for Railways

The decision of the Railway Tribunal can be appealed against on a question of law. Appeals lie to the Federal Court. This is in consonance with the conception of the Railway Judiciary. When the first Court has decided both on merits and law, with the combined wisdom of railway knowledge and legal technicalities, (and when Railway matters ought to be decided quickly) it is but proper that an appeal is restricted only to questions of law and the appellate judgment is made the final judgment on the matter. Sec. 196 (4) definitely says that no

appeal shall lie from the decision of the Federal Court on any such appeal. So the Constitution has taken away the right of second appeal to any other authority. It should be deemed that even the right of the Crown its prerogative to hear an appeal as the fountain of justice is expressly denied.

But the situation or inconvenience of making the Federal Court, the final Appellate Court is mitigated by the fact that both the Railway Tribunal and the Federal Court may on an application made for the purpose, alleging alteration in the circumstances, vary or revoke any previous orders made by it. One matter has to be made clear in the Rules of Practice to be framed by the President of the Tribunal. Can a person who filed an application *before the Railway Tribunal* to revoke one of its previous orders and got it rejected, again file another application *before the Federal Court* for a similar relief? I believe it is possible. The wording of the section is "an application..... to revoke any previous order made by *'it'*." 'It' refers to Railway Authority *and* Federal Court and to *their* orders *individually*. There is nothing improper in a Federal Court being moved again even if the Railway Authority refuses to move. The Federal Court, if it acts at all, will act only to revoke *its* own order and not that of the Railway Tribunal.

Are not railway cases equally important to deserve the right of preferring a second appeal? Can the right to appeal to the Crown be negatived by a provision in the Act of the Constitution? It has been held in *Att. G. for Ontario V. Att. G. for the Dominion*, 1896 A. C. 348 that a statute making a judgment of Court of appeal 'final' cannot infringe the prerogative of the Crown to allow further appeals as an *'act of grace!* The word 'final' can only apply to rights given under statutes and has no reference to prerogative rights, beyond the written Code. But the matter was considered again and again by Courts. The latest case on the point is *the British Coal Corporation V. The King, 1935 A. C. 500* which decides,

that a competent legislature can enact expressly a provision negativing the right of an appeal to any other authority and if it is acceded to by the Crown, it means the prerogative-right is lost. Sec. 196 (4) expressly states *"no appeal* shall lie from the decision of the Federal Court on any such appeal". The Government of India Act is an Act of Parliament, acceded to by the Crown.

Connection With the Federal Court–What It Indicates ?

As already stated, the connection between the Federal Court and the Railway Tribunal is intimate. The President of the Tribunal is a member of the Federal Court. Appeals lie to the Federal Court and there is no appeal from the decision of the Federal Court. These intimate ties have been improvised for the purpose which the White Paper had in view—'His Majesty's Government considers it essential that while the Federal Government and Legislature will necessarily exercise a general control over railway policy, the actual control of the administration of the State Railway in India (including those worked by companies) should be placed by the Constitution Act in the *hands of a Statutory Railway Authority, so composed* and with such powers as to ensure that it is in a position to perform its functions *upon business principles without being subject to political interference*" [1]

The idea of making the Railway Tribunal not amenable to political parties should have been responsible for one of the Federal Judges, whose appointment is beyond political influence and whose tenure is almost permanent till his 65th year, being made the President of the Tribunal, and also making the appellate judgments (in appeals from Railway Tribunals) of the Federal Court, the last and final decisions on the matter. Thus the Railway Tribunal is capable of commanding as much esteem by its conduct and integrity, as the Federal Court, in course of time. It has to, as it is the Federal Judiciary for Railway matters. Unless by its

1 *J. P. C. Report p. 230 para 392.*

impartiality and really effective judgments it is able to mete out justice between States and the Federation, it is not likely to make the working of the Federal structure smooth or foster the Federal Spirit in the States or Provinces. The responsibility of the Railway Tribunal is as great as that of the Federal Court and it shall act as a close ally and a helping hand to the latter.

Another point in knitting the Railway Tribunal with the Federal Court may also be noted. The position of the Federal Court as the interpreter of the Constitution and Constitutional Documents should not be prejudiced and arrangements have to be made with that in view.[2] This has been very effectively achieved by its close association with the first Court and reserving rights to hear appeals to the Federal Court. So, in fact and effect, the Railway Tribunal is only a limb of the Federal Judiciary.

Difficulties Ahead

People who had studied the question of development of Railways and attempts at a public control, and effective check to avoid competition in charges between Federal Units and the stories of serious discrimination, know how the conception of the Railway Tribunal as associated with the Federal Court is a distinct improvement in the constitutional control over Railways. 'In the beginning of the Railway Era, in the United States, Congress made no attempt to devise any comprehensive and far sighted plan of public control.....Congress bent upon the swift development of the country, devoted its attention rather to bestowing generous favours on Railways, corporations..... The result was, scandals and frauds as well as high and romantic adventures marked the path of congressional procedure, as huge railways were flung out under Government patronage now to the Great Lakes, now to the Gulf of Mexico, now to the Pacific."

2 *Chairman's Draft Report J. P. C. R.* Vol. I Part II Proceedings p. 206 para 370. Sketch Proposal (12)—Indian Reprint p. 220.

"In the operation of the railways, all kinds of abuses appeared. Stocks and bonds were issued in enormous amounts without basis in material values The highest possible rates were charged.....There were discrimination in terminal charges.....Railways favoured certain ports and sections at the expense of others. The companies were competing and fighting among themselves.....There arose abuses, problems of great magnitude which demanded public consideration. These led to the demand for reforms and the appointment of an Inter-State Commerce Commission which is entirely independent of the Department of Commerce and all other branches of the Federal Government..... The Commission is a quasi-judicial body in that it hears complaints, issues orders and makes decisions.[3] Dangers of a Railway System not controlled constitutionally are too many, likely to harass and impede the friendliness and harmony between States.

The task of the Federal Railway Tribunal is hard. Questions of rates, constant controversies between State and National Authorities may arise as it did in the *Wisconsin case* of 1922 which raised the railway rate with a view to secure a fair return. There are also other conflicting and confused regulations of States. There is always the demand for nationalising the railways. In India especially, the rates between the different railways are very different; some of the Railways are State-owned, some British-Government-owned, some controlled by local Bodies and others are run by private foreign companies, all with their vested interests. Some work at a profit, others not. Reforms at railways under one body, are suggested. Till that or any other uniform control is arrived at, till the railway-unification is achieved, railway problems are sure to appear, why loom larger, as Federation begins to work and the duty and task of the Railway Tribunal are sure to be onerous. One can be sure that the Indian Railway Tribunal will stand the test, as it is a well-designed mixture of technical and legal brains.

3 *American Government and Politics*-by Beard pp. 383—386

CHAPTER XX

RAILWAY CASES [1]

Interpretations of Statutes-re: Railways

The final words of a section are matters of procedure and in prescribing the procedure, the Legislature must be taken to have assumed that all necessary communications between the Dominion Governments and the Provincial Governments would always take place. Sir Arthur Wilson in *Att. G. for British Columbia V. Canadian Pacific Railway, 1906. A. C. 204 at 211.*

Repairs, Construction and Alteration

The Federal Legislature has exclusive right to prescribe regulations for the construction, repair and alteration of railways connecting provinces. The Provincial Legislature has no power to regulate the structure of a ditch forming a part of its authorised works. This does not prohibit a Municipality prescribing a law for the cleaning of the ditch and the removal of an obstruction which may cause inundation on neighbouring land. The Municipal law is intravires. *Canadian Pacific Railway V. Notre Dame De Bonsecours Corpn.* 1899. A. C. 397=80 LT 434. P. C.

Construction-Track and Buildings

Lord Moulton said 'that a provincial legislation as to the physical construction and use of the track and buildings of a Dominion Railway is ultravires and the use of the word 'reasonable' or 'reasonable use' in the Provincial Act will not make it

1. Refer also to Chapters 10 & 11 *'Federal Decisions'*

intravires, as the Provincial Legislature has no power of legislation regarding them. *Att. G. Alberta V. Att. G. Canada*, 1915 A. C. 363 at 368.

Crossing the Tracks, Power of Provincial Railways

Constitutional Position

The constitutional aspect of the matter has to be looked at, apart from the physical difficulties, an interpretation of an Act or a Section of it may lead to. There may be circumstances under which the exclusive power of the Paliament to legislate as to Dominion Railways appears to operate most harshly on the freedom of action of the Province. It was urged with great force that if the provinces have no power to authorise their railways to cross the tracks of Dominion Railways, they might theoretically be placed in a position of great difficulty. Regarded in the abstract, it might be possible for a track of country situate in a province to be surrounded by Dominion Railways, in such a way, that unless crossing were permitted, a provincial railway situate within that tract would be completely isolated, cut off from access to other portions of the provinces. But the difficulty is essentially *administrative* and not one that could be cured by any decision as to *constitutional rights*. It is scarcely too much to say that it would not be practicable to frame the actual claim of the Province in the present case in such a way that it could be a *constitutional* right possessed by a province. Even the Province could not give to one of their own railways the right to cross a Dominion Railway at any place or in any specific way chosen by them. They admitted that the place and manner must be subject to the approval of the Railway Board, a body created by the Dominion Statute— The problem can be cured only in one way. *The Federal Legislature is entitled to legislate as to the crossings because they are upon the right* of way and track of the Dominion Railway as to which, the Dominion has exculsive rights of legislation. The Dominion has powers to grant permission to Provincial Railways. 'These powers of permitting crossings by Provincial

Railways under suitable circumstances and with proper precautions have not been given to them idly and for no purpose. They bring with them the duty of using those powers for the benefit of the public whenever an occasion arises, where they can be wisely used In this way, the legitimate claims of Provincial Railways to obtain facilities for crossing Dominion Railways are in fact met as fully as is practicable and this without risking the chaos of overlapping legislative powers,—Lord Mouton in *Att. G. Albert V. Att. G. Canada,* 1915 A. C. 363 at 369.

Dominion Encroachment of State Powers

'Federal Railways' as a subject have been put down as an item coming under the Federal Legislature. It includes also all railways. But this does not clothe the Federal Legislature with powers to interfere with the rights of the States. But it was held in *Toronto Corporation V. Canadian Pacific Railway* Company 1908 A. C. 54, 58 that for the purpose of securing effective railway administration, they may encroach upon the Provincial Legislative domain in respect of property and civil rights. But this power has been very sparingly used.

Crown Lands and Railway

The Dominion Parliament has jurisdiction to make use of the Crown Lands in any way the Parliament desires. Sir Arthur Wilson said in *Attorney General for British Columbia V. Canadian Pacific Railway,* 1906 A. C. at page 210, 'to construe the sections now, in such a manner as to exclude the power of the Parliament over Provincial Crown land, would be inconsistent, with the terms of the sections which they have to construe with the whole scope and purpose of the legislation and with the principle acted upon in the previous decisions of the Board. Their Lordships think that the Dominion Parliament had full power to authorize the use of the Provincial Crown lands by the company for the purpose of this railway.'

But the Dominion cannot restrict the right of the Province to deal with lands which are Crown lands, and which are *not* Railway lands as such and which do not form a part of the 'Railway'. Provincial Lands vested by statues in a Railway Company which have been declared by a Dominion Statute to be a work for the general advantage of Canada are subject to a Statute of a Province authorising the issue of Crown Grants of the lands, save so far as the lands are part of the 'railway' as defined in the Act *Wilson V. Esquimalt and Nanaimo Railway Co.*, J. C. 1922, 1 A. C. 202, 1921 W. N. 335.

When a Governor grants 'Crown Lands' under the Act he is acting judicially but he is not obliged to follow strictly the rules regarding procedure of a Court. On proof of necessary facts, if he exercises his discretion, it should be deemed to be "reasonable proof ! *Local Government Board V. Arlidge*, 1915 A. C. 120.

Although the Act states that the compensation for Crown lands taken will be paid to a particular authority, there is no reason why that authority should not direct that any compensation received in respect of the Crown Lands of a Province should be made over to the Government of the Province. This reference to an authority as the receiving authority is only a machinery. Viscount Cave L. C. in *Att. G. Quebec V. Att. G. for Canada*, 1926 A. C. 715 at 719.

Passage—Right to Obstruct

A power given to the company to appropriate the foreshore for the purposes of their railway, of necessity includes the right to obstruct any right of passage previously existing, across the foreshore of sea—Sir Arthur Wilson in *Att. G. for British Columbia V. Canadian Pacific Railway*, 1906 A. C. 204 at 212.

Electricity

In modern times, electricity plays a large part and the wires connect all known parts of a country. Their passing railway lands

or railway lines ought to give us in India a crop of dispute. They, as was said in a judgment in *Maritime Telegraph and Telephone Co., V. Dominion Atlantic Ry., Co,,* 1916. 20 Can. Ry. Cases 213 stretching as they do over the whole country, of necessity must be crossed from time to time by innumerable telephone and telegraph wires and to lesser extent by the wires of electric power and light railways companies.....All public utilities must be served, railways not more than others and the fact that under the section the commissioners are not in set terms empowered to refuse an application made to them seems as least to justify the judicial view expressed in the same report, that the issue on every such application must always be made in particular circumstances of the case under consideration.'

So the application will have to be made by the Electric Companies to the Railway Companies concerned and the permission will be granted generally without prejudice to their own rights.

Proprietory Rights

The power to legislate in respect of any matter must necessarily to a certain extent, enable the Legislature so empowered to affect proprietory rights and.....where legislative power cannot be effectively or effectually exercised without affecting the proprietory rights, both of individuals in a Province and of the Provincial Government, the power to affect those rights is necessarily involved in the Legislative Power. *Viscount Cave* in *Att. G. for Quebec V. Att. G. for Canada*, 1926 A. C. 715 following *Att. G. for Canada V. Att. G. for Ontario, Quebec and Nova Scotia* 1898 A. C. 700, 712.

Rates—Unjust Discrimination

Generally no discrimination will be permitted and if it should be legally justifiable at all, it must be shown as Lord Atkinson in *City of Montreal V. Montreal Street Railway*, 1912 A. C. 333 at 344, observed, that it is necessarily incidental

to the exercise of control over the traffic of a Federal Railway, in respect of its giving an unjust preference to certain classes of its passengers otherwise, that it should also have power to exercise control over 'through' traffic of such a purely local thing as a provincial railway properly so called if only it be connected with a federal railway.....There is not a suggestion (in this case) that through traffic between this federal line and this local line had attained such dimensions before this Railway Act was passed, as to affect the body politic of the Dominion.

Dual Control—Not Countenanced

The Courts are against the claim of the Dominion setting up any right over Provincial or State railway as a rule. A contention raising the absolute right of the Dominion, wherever a federal line and a local provincial line connect, to establish this dual control over the latter line whenever there is through traffic between them, was not accepted. It was held it was not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines and the contention if allowed would be unauthorised invasion of the rights of the Provincial Legislature, Lord Atkinson *in City of Montreal V. Montreal Street Railway*, 1912 A. C. 333 at 345.

Through Traffic—Who is to Control?

A very patronising argument exhibiting great solicitude which in effect amounted to the Federal Legislature claiming control over the through traffic was negatived in the City of *Montreal V. Montreal Street Railway*, 1912 A. C. 333 at 346, by Lord Atkinson who met the question most practically and silenced the pretended anxiety of the Canadian Dominion Government, which was not altogether nonlegal in form. That portion of the Lord's judgment deserves being quoted in extenso, "one of the arguments urged on behalf of the appellants was this; the through traffic must, it is said, be controlled by some

legislative body. It cannot be controlled by the Provincial legislature because that legislature has no jurisdiction over a federal line. *therefore* it must be controlled by the Legislature of Canada, [Has the Canadian Legislature control over Provinces? Is the Dominion making a case to claim everything that may not belong to the State, as the Dominion's? Truly it is fine Federal spirit.—Ed.

'The answer to that contention is that so far as the 'through' traffic is carried on over the Federal line, it can be controlled by the Parliament of Canada. And so far as it is carried over a nonfederal provincial line, it can be controlled by the Provincial Legislature and the two companies who own these lines can thus be respectively compelled by these two Legislatures to enter into such an agreement with each other as will secure that this 'through' traffic shall be properly conducted and further it cannot be assumed that either body will decline to cooperate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the Province as the regulation of 'through' traffic.

Contribution of Expenses

It is an accepted principle that an enactment throwing the expenses incurred in "local works and undertakings for the general advantage of two or more of the Provinces," on the parties interested is intravires of the Federal Legislature. Lord Collins who delivered the judgment in *Toronto Corporation V. Canadian Pacific Railway Company*, 1908 A. C. 54 at 59 said, there was nothing ultravires in the ancillary power conferred, to make an equitable adjustment of the expenses among the parties interested. Corporations interested in such works are subject to the Legislation of the Dominion Parliament as to their cost, though generally subject only to the Provincial Legislature. On the contention, namely that the Provincial Railway Company was not a 'person' interested, it was held that the Municipality was a 'person' interested.

This decision was followed in *Toronto Railway Company V. Toronto City 1890 A. C. 426* which raised another contention that it was ultravires of the Dominion Parliament in legislating for a Dominion railway, to make incidental provision affecting Provincial Municipalities or Railway Companies. This contention was held to be based on no principle and Viscount Finaly put forward the most constructive constitutional agreement against such a contention. " It is not a case in which there is any meddling by the Dominion Parliament with the working of a Provincial Railway Company, there is only a provision that it shall bear the cost of works in relation to the Dominion Railways which affect the Provincial Line. *To hold that such a provision was ultravires would give rise to a very great difficulty in dealing with railways by legislation under any scheme of Federation.*"

Penalty

A Railway Authority for the purpose of enforcing obedience to an order may fix a penalty and make an order for paying the same in the case of default by the company. But it can be enforced only after due notice to the railway company and after giving an opportunity to comply with the condition. *Toronto Railway Company V. Toronto City,* 1920 A. C. 416.

Jurisdiction of the Provincial Legislature over the Dominion Railway

A Provincial Authority has no jurisdiction to make an order that the Federal Railway should construct certain sanitary arrangements on their Railway. *Hamilton Grimsby and Brarnsvillee Railway V. Att. G. for Ontario,* 1916 (2) A. C. 583.

CHAPTER XXI

CAN THE FEDERAL COURT BE ABOLISHED?

Why this question? Is it not an unreasonable fear, that is at the root of it? Is it not due to a constitutional cynicism? Is it not born of undue anxiety to experimentalise Constitutional Machineries? It may be any of these or none of them. As a constitutional thinker, one has to face the situation, that may arise or even a hypothetical one.

After all the question is not altogether unwarranted. The American Constitution had to meet such a contingency once, when the appointing authority on the resolution of the Congress refused to appoint the judges.

Section 200 of the India Act says "there *shall* be a Federal Court." Sub section (2) provides for the appointment of judges by His Majesty. The number has to be decided by him but it will not be not less than three. The number 'three' is drawn out of inference from a clause in Section 214 which conditions, 'no case shall be decided by less than three judges.'

A court that functions may have vacancies in judges' posts, resulting out of death, age-bar or infirmity or removal. Suppose these vacancies are not filled up. If the number is below three, there cannot be a valid judgment. This leads to the wreck of the Federal Court. But this is not likely to happen. The work of the Federal Court, its capacity to create a tradition, its influence on public opinion and its popularity based upon impartiality and justice it displays and renders, are calculated to weigh with the

Crown and His Majesty will hardly take up an attitude to wreck a machinery, which he himself is setting up as an essential item in the Federal-fabric.

The destruction of the Court can be accomplished by the United States Government only graudually, if it is so minded, while it can be done immediately in Germany and France. The Judicial tenure is originally fixed by the Constitution in the system of United States, while in the latter two, it is fixed by statutes. In India, the Federal Court is an item of the Constitution and it cannot be erased easily.

It is quite possible that the Federal Court by its impartiality and rule of law and by the power of interpretation of that Act vested in it by Constitution, may, by exercise of its powers provoke the wrath of the Federal Executive or even of His Majesty, if He is easily susceptible and of the States. Will this lead to "His Majesty" not making the appointments to the Federal Court and will He strangle the only interpreter of the Constitution? An intemperate sovereign may feel that the interpretations of the Federal Court are depriving him of certain sovereign rights and the decisions are not to his pleasure.

The appointments are left entirely in the hands of His Majesty and not even in 'His Majesty in Council' —and as such, he is entitled to refuse making appointments. *In theory he can do it.*

When a President[1] of the United States on the enactment of the Congress refused to make appointments and kept the vacancies unfilled, he did run a huge risk of facing public odium. A President of a republic is after all a party head, owing his position to the party and in a way unconsciously subordinate to the dictates of his party. He is likely to take a strong view of the decision of the Federal Court, if it is not of his ways and views.

But is His Majesty likely to do so? He is above all party and does not have any interest in any party. But one question

1 President Johnson

remains. The imperialistic outlook of a sovereign, a feeling of a vested interest as one owning a territory and a spirit of defeatism by a decision of a Federal Court which may lead to a deprivation of some assumed right, may infuriate His Majesty and he may drop making the appointments to the vacancies in the Federal Court.

What a constitutional Force *can do*, is different from what it *does* in actual practice. As Viscount Sankey L. C. wrote "it is doubtless true that the power of the Imperial Parliament to pass, on its own initiative, any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed the Imperial Parliament could as *a matter of Abstract Law* repeal or disregard section 4 of the Statute. But *that is theory and has no relation to realities*"[2]

Public opinion, political education directed by the Jurists, the aristocracy of the robe, all will stay the hand of His Majesty from taking this fearful step.[3]

Besides, the States join the Federation with a feeling that any dispute between it and the Federal State will be decided by a proper Judicial Tribunal, the Federal Court. That is one of the conditions in the Instruments of Accession. If the Federal Court should be scrapped, it is at once a breaking away from the contract and the States will naturally go off the Federation and the collapse of the Federal structure will be inevitable. Will "His Majesty" court such a catastrophe? We shall not, for the present, imagine the constitutional deadlocks that will result in England and India by such a false and terrible move.

A scholarly American view of the matter may deserve our attention. "It is sometimes incorrectly said that the Courts are established as an independent department of the Government. Or to put it more popularly the Constitution creates the Courts.

2 *British Coal Corporation V. The King* 1935 A. C. 500 at 520

3 *Political Science & Constitutional Law*—by Burgess, p. 363

Such is *not* the case. It is true that the Constitution provides that the Judicial Power shall be vested in one Supreme Court and in inferior courts *but by this provision the Courts do not come ipso facto into existence* The action of both the Executive and Legislative departments is necessary. In the first place the number and compensation of the Justices must be determined by the Congress and fixed by Statute. Even after the Statute is passed, the President with the advice and consent of the Senate must appoint the judges. Thus since the organisation and composition of the court are dependent upon the Congress and the President, it is possible for the Congress to increase the number of the judges and with the connivance of the President to pack the Court so that a majority out of sympathy with the Congress may be overwhelmed. *Or on the other hand, the Congress may as it did during the administration of Johnson enact that vacancies should not be filled* and thus reduce the number of Justices. *Such actions however would be unconstitutional in the sense that they amounted to a violation of the spirit of the Constitution but that they would be illegal in the sense that they were open to punishment, would be difficult of proof.*[4]

Fears apart, and possibilities though there are, the British tradition and constitutional instinct to respect enactments and judge-made-law will always survive and His Majesty will never take this wrong step and if he does, that day, the history of the British politics will stand belied.

4 *The National Government of the United States*—by E. Kimball, Ph. D., p. 379

CHAPTER XXII

SUCCESS OF THE FEDERAL JUDICIARY

The Federal Judiciary has been a success in America in spite of checks on its onward march. To create a judiciary and invest it with a halo of dignity is indeed impossible. It should grow out of itself and it cannot be made by any outside force. No window dressing is capable of achieving it. Impartiality, Justice and Mental Contentment born of Justice delivered, are abstract qualities that are generated by pure acts, pure sights we see and pure impulses we feel. A Federal Judiciary always takes time to settle itself to realise its sphere and form its opinions.

The Constitution has drawn the outlines of the system, rules of Court may be framed hereafter and they may be changed as warranted by the times. Nevertheless the working of it is to be gained by experience. Bryce raises the question of the difficult machinery and answers it himself—

"How is it possible to work a system so extemely complex under which every yard of ground in the Union is covered by two jurisdictions with two sets of judges and officers.....The answer is, it does work and work smoothly too.....It leads to few conflicts or heart burnings, because the key to *all difficulties is found in the principle that wherever Federal Law is applicable, Federal Law must prevail and that every suitor who contends that Federal Law is applicable is entitled to have the point determined by a Federal Court.*

The acumen of the lawyers and judges, and the wealth of accumulated precedents, make the solution of these questions of

applicability and jurisdiction easier than a European practioner can realise, while the law respecting habits of the people and *their sense that the supremacy of Federal Law and Jurisdiction works to the common benefit of the whole people secure general obedience to Federal Judgments*.....Difficulties arise. They are not due to conflicts between State and Federal pretentions but to other tendencies equally hostile to both the authorities.[1]

All Courts—One Whole

As Federal Rule advances, our conception ought to undergo a change and it will too. Terms of State or Province ought to give place to terms of Federation. The welfare of a particular State ought to be thought of as compatiable with the prosperity of a congregation of States. State antagonisms should die out and State-cordiality should spring up. The execution of a Federal Law, the respect for it and anxiety to preserve it sacrosanct, should be on a par with those of the state laws too. If such a mental outlook is reached, the difference between two Courts, as may be observed, will vanish. If it exists at all, it will be a mere formality.

Inherent Disadvantage

'The inherent disadvantage of the very essence of the Federal constitution is that they engender parties in the bosom of the nation which present a powerful obstacle to the free course of justice'.

Majesty of the Federal Court

The Judges' Powers

'The position, prestige and powers of the Federal Court are peculiar. It summons Sovereign Powers to its bar.....The peace, prosperity and the very existence of the Union are vested

1 *American Commonwealth* — by Bryce p. 228

in the hands of its judges. Without their active cooperation, the Constitution would be a dead letter. The Executive appeals to them for assistance against the encroachment of Legislative powers, the Legislature demands their protection from the designs of the Executive, they defend the Union from the disobedience of the States, the State from the exaggerated claims of the Union, the public interest against the interests of private citizens and the conservative spirit of Order against the fleeting innovations of Democracy.

'The power of the Judges is enormous but it is clothed in the authority of public opinion. They are the all powerful guardians of a people who respect law but they would be impotent against popular neglect or contempt. The force of public opinion is the most intractable of agents because its exact limits cannot be defined and it is not less dangerous to exceed than to remain below the boundary prescribed.

Federal Judges

The Federal Judges must be not only good citizens and men possessed of that information and integrity which are indispensable to magistrates, but also they must be statesmen-politicians. not unread in the signs of the times, not afraid to brave the obstacles which can be subdued, nor slow to turn aside such encroaching elements as may threaten the supremacy of the union and the obedience which is due to the laws.

Bad Judges—What result

If the Federal Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy and war... The cause of this danger is inherent in Federal Governments not so much in the Tribunal. In Confederate Peoples it is necessary to consolidate the Judicial Authority.....But the more a power requires to be strengthened, the more extensive and independent it must be made and the dangers which its abuse may create are

heightened by its independence and its strength.[2] The National and State Systems are to be regarded by all as one whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union and an appeal from them will naturally lie to that tribunal, which is destined to unite and assimilate the principles of natural justice and rules of the national decisions. [3]

Matter of Constitutional Growth

One can understand that a conception of the two systems of courts as one whole, is hard to achieve in practice and within the time one may budget. Years and centuries of instinctive feeling will have to develop, before one can say that the mentality has changed. In India, especially where large areas have been subject to State Laws, and State Control and where the personal rule of a Maharajah or a Nawab was looked up to with a personal attachment and loyalty, to develop at once a constitutional fondness for a Federal Tribunal — impersonal and distant — is rather overstraining and not easy, as it is nothing short of a revolution in the States peoples' political psychology.

Merit of Courts

Nevertheless few institutions are better worth studying than this intricate judicial machinery; few may deserve more admiration for the expected smoothness of their working, few may contribute to the peace and well-being of the country. The Indian High Courts have established their name and fame, why the judgments of even the Lower Judiciary in India have been hailed as model judgments. The Federal Court when established, will only further assure the world that India will stand any test and probably the Indian Federal Decisions will lead the future Federal Jurisprudence with their variety of matter, wealth of delicate conflicts and their excellent style and form, in which their well-considered solutions may be clothed.

2 *Democracy in America* — by De Tocquille p. 150

3 The *Federalist*

Fortunes of the Federation in its Hands

The new constitutional experiment of a Federation for India is to receive its blessing and is to earn a good name from the activities of the Federal Tribunal. State to state bickering, state versus nation troubles, taxation provincial and imperial, civil rights of citizens well or ill demarcated, traffic and regulation laws all may have to go into the melting pot in Federal litigation and the duties of the Federal Judges will be to see that they emerge out of them with redoubled effulgence of purity and justice. If a state is made to sacrifice, it should be made to do it with all pleasantness, with all responsibility and what more, with a conviction that the sacrifice is willingly made at the altar of National Welfare. There shall not be any recognition of usurpation of powers, nor shall there be a countenance of any action capable of being understood as an encroachment on the realm of a State or the Nation. A Federation will be a union of diversities, a happy harmonious mixture of varieties, each solving its problem and each surrendering a portion of its self, for the greater prosperity, based on the willing subordination of all. Surely there is no parallel in history for the Indian Federation. There is no historical precedent for the union of so many diverse units and the voluntary sacrifice that will be necessary of so many autocratic privileges.[4] Merit lies in justifying this glorious unprecedented happening in India. The parties to the Federation should know their differing centres and it shall be the pleasant and sometimes painful duty of the Federal Court to indicate these. The Chamber of Princes recognised this and a Resolution of the Chamber wishes to emphasise that the inauguration and success of the Federation will depend entirely on the *good will and cooperation of all parties* concerned and upon the clear recognition of the Sovereignty of the States *and their rights under treaties and engagements.*[5]

This fear of the Maharajah of Patiala and other Princes ought to be silenced by the impartial way in which the Federal

4 The Rt. Hon. Lord Meston in the *Contemporary Review* Jan. 1935 p. 6

5 Proceedings of the Chamber of Princes-Maharajah of Patialas' Resolution

Court will conduct itself. The majesty and magnificence of the Court will get enhanced by the opinion, the suitors may begin to have about it.

If a defeated suitor leaves the precincts of the Court with the impression that he had his case fully heard and the judges had done what they could do for him, the Court has more than justified its existence. If that is the function of the ordinary Court which deals primarily with laws of citizens, much more so, should be the duty of the Federal Court which deals with the States and rights of the States. To satisfy the States (which have within them more than the major portion of the population of India, and whose rights incidentally have to be decided in the litigation in which States are parties) is indeed a trying task and especially when the States are joining the Federation with considerable hesitation and misgiving, probably with a feeling of inevitability in India's political evolution, the responsibility of the Federal Court is all the greater and the first function of the first set of Federal Judges should be to remove this misapprehension by their acts and judicial discharge of their high office and make the States feel they have joined in a great cause of furthering India's Nationhood and that they have not taken a step which they need regret. The Court should convince the States that it is their Protector and Guardian Angel of all their vested interests, rights and liberties.

The high level of the Federal Judgments will be indicative of the contentment of the whole Indian Federation, nay the Indian Nation. What cheap talks on platform cannot do, what impassioned appeals in the Press fail to evoke and what ethical lectures in Convocations cannot infuse, let the Federal Tribunal do. "The Federal Court of India" will be the test of India's Federal Greatness and let it revive the ancient unity of India in a new garb, with its culture oriented and its tradition modernised.

APPENDIX A

SECTIONS RELATING TO FEDERAL COURTS

Section 6. Accession of Indian States.

(1) A State shall be deemed to have acceded to the Federation if His Majesty has signified his acceptance of an Instrument of Accession executed by the Ruler thereof, whereby the Ruler for himself, his heirs and successors—

(a) declares that he accedes to the Federation as established under this Act, with the intent that His Majesty the King, the Governor-General of India, the Federal Legislature, the Federal Court and any other Federal authority established for the purposes of the Federation shall, by virtue of his Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Federation, exercise in relation to his State such functions as may be vested in them by or under this Act; and

(b) assumes the obligation of ensuring that due effect is given within his State to the provisions of this Act so far as they are applicable therein by virtue of his Instrument of Accession:

Provided that an Instrument of Accession may be executed conditionally on the establishment of the Federation on or before a specified date, and in that case the State shall not be deemed to have acceded to the Federation if the Federation is not established until after that date.

(2) An Instrument of Accession shall specify the matters which the Ruler accepts as matters with respect to which the Federal Legislature may make laws for his State, and the limitations, if any, to which the power of the Federal Legislature to make laws for his State, and the exercise of the executive authority of the Federation in his State, are respectively to be subject.

(3) A Ruler may, by a supplementary Instrument executed by him and accepted by His Majesty, vary the Instrument of Accession of his State by extending the functions which by virtue of that Instrument are exercisable by His Majesty or any Federal Authority in relation to his State.

(4) Nothing in this section shall be construed as requiring His Majesty to accept any Instrument of Accession or supplementary Instrument unless he considers it proper so to do, or as empowering His Majesty to accept any such Instrument if it appears to him that the terms thereof are inconsistent with the scheme of Federation embodied in this Act:

Provided that after the establishment of the Federation, if any Instrument has in fact been accepted by His Majesty, the validity of that Instrument or of any of its provisions shall not be called in question and the provisions of this Act shall, in relation to the State, have effect subject to the provisions of the Instrument.

(5) It shall be a term of every Instrument of Accession that the provisions of this Act mentioned in the Second Schedule thereto may, without affecting the accession of the State, be amended by or by authority of Parliament, but no such amendment shall, unless it is accepted by the Ruler in a supplementary Instrument, be construed as extending the functions which by virtue of the Instrument are exercisable by His Majesty or any Federal authority in relation to the State.

(6) An Instrument of Accession or supplementary Instrument shall not be valid unless it is executed by the Ruler himself, but, subject as aforesaid, references in this Act to the Ruler of a State include references to any persons for the time being exercising the powers of the Ruler of the State, whether by reason of the Ruler's minority or for any other reason.

(7) After the establishment of the Federation the request of a Ruler that his State may be admitted to the Federation shall be transmitted to His Majesty through the Governor-General, and after the expiration of twenty years from the establishment of the Federation the Governor-General shall not transmit to His Majesty any such request until there has been presented to him by each Chamber of the Federal Legislature, for submission to His Majesty, an address praying that His Majesty may be pleased to admit the State into the Federation.

(8) In this act a State which has acceded to the Federation is referred to as a Federated State, and the Instrument by virtue of which a State has so acceded, construed together with any supplementary Instrument executed under this section, is referred to as the Instrument of Accession of that State.

(9) As soon as may be after any Instrument of Accession or supplementary Instrument has been accepted by His Majesty under this section, copies of the Instrument and of His Majesty's Acceptance thereof shall be laid before Parliament, and all courts shall take judicial notice of every such Instrument and Acceptance.

Section 16. Advocate-General for Federation.

(1) The Governor-General shall appoint a person, being a person qualified to be appointed a judge of the Federal Court, to be Advocate-General for the Federation.

(2) It shall be the duty of the Advocate-General to give advice to the Federal Government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Governor-General, and in the performance of his duties he shall have right of audience in all courts in British India and, in a case in which federal interests are concerned, in all courts in any Federated State.

(3) The Advocate-General shall hold office during the pleasure of the Governor-General, and shall receive such remuneration as the Governor-General may determine.

(4) In exercising his powers with respect to the appointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor-General shall exercise his individual judgment.

Section 33(3). Salaries, etc. of the Advocate-General and the Federal Judges.

The following expenditure shall be expenditure charged on the revenues of the Federation—

(c) the salaries and allowances ...of the advocate-general, etc.

(d) the salaries, allowances, and pensions payable to or in respect of judges of the Federal Court, and the pensions payable to or in respect of judges of any High Court;

Section 40. Restrictions on discussion in the legislature.

(1) No discussion shall take place in the Federal Legislature with respect to the conduct of any judge of the Federal Court or a High Court in the discharge of his duties.

In this subsection the reference to a High Court shall be construed as including a reference to any court in a Federated State which is a High Court for any of the purposes of Part IX of this Act.

Provisions In Case Of Failure Of Constitutional Machinery

Section 45. Power of Governor-General to issue Proclamations.

(1) If at any time the Governor-General is satisfied that a situation has arisen in which the government of the Federation cannot be carried on in accordance with the provisions of this Act, he may by Proclamation—

(a) declare that his functions shall to such extent as may be specified in the Proclamation be exercised by him in his discretion;

(b) assume to himself, all or any of the powers vested in or exercisable by any Federal body or authority,

and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation,

including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Federal body or authority:

Provided that nothing in this subsection shall authorise the Governor-General to assume to himself any of the powers vested in or exercisable by the Federal Court or to suspend, either in whole or in part, the operation of any provision of this Act relating to the Federal Court.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) A Proclamation issued under this section—

(a) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament;

(b) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months:

Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this subsection it would otherwise have ceased to operate.

(4) If at any time the government of the Federation has for a continuous period of three years been carried on under and by virtue of a Proclamation issued under this section, then, at the expiration of that period, the Proclamation

shall cease to have effect and the government of the Federation shall be carried on in accordance with the other provisions of this Act, subject to any amendment thereof which Parliament may deem it necessary to make, but nothing in this subsection shall be construed as extending the power of Parliament to make amendments in this Act without affecting the accession of a State.

(5) If the Governor-General, by a Proclamation under this section, assumes to himself any power of the Federal Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the appropriate Legislature, and any reference in this Act to Federal Acts, Federal Laws, or Acts or laws of the Federal Legislature shall be construed as including a reference to such a law.

(6) The functions of the Governor-General under this section shall be exercised by him in his discretion.

Section 86. Restrictions on Discussion in Provincial legislature.

(1) No discussion shall take place in a Provincial Legislature with respect to the conduct of any judge of the Federal Court or of a High Court in the discharge of his duties.

In this subsection the reference to a High Court shall be construed as including a reference to a court in a Federated State which is a High Court for any of the purposes of Part IX of this Act.

Distribution of Powers

Section 99. Extent of Federal and Provincial laws.

(1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, no Federal law shall, on the ground that it would have extra territorial operation, be deemed to be invalid in so far as it applies—

(a) to British subjects and servants of the Crown in any part of India; or

(b) to British subjects who are domiciled in any part of India wherever they may be; or

(c) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or

(d) in case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or

(e) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and the persons attached to, employed with or following, that force, wherever they may be.

Section 100. Subject-matter of Federal and Provincial laws.

(1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding subsection, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

Section 106. Provisions as to legislation for giving effect to international agreements.

(1) The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous

consent of the Governor, or for a Federated State except with the previous consent of the Ruler thereof.

(2) So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State.

(3) Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry.

Section 107. Inconsistency between Federal laws and Provincial, or State, laws.

(1) If any provision of a Provincial law is in repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved

for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with the respect to the same matter:

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

Section 124. Power of Federation to confer powers, etc. on Provinces and States in certain cases.

(1) Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends.

(2) An Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer

powers and impose duties upon a Province or officers and authorities thereof.

(3) An Act of the Federal Legislature which extends to a Federated State may confer powers and impose duties upon the State or officers and authorities thereof to be designated for the purpose by the Ruler.

(4) Where by virtue of this section powers and duties have been conferred or imposed upon a Province or Federated State or officers or authorities thereof, there shall be paid by the Federation to the Province or State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the Province or State in connection with the exercise of those powers and duties.

Section 127. Acquisition of land for Federal purposes.

The Federation may, if it deems it necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which the Federal Legislature has power to make laws, require the Province to acquire the land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation on such terms as may be agreed or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.

Section 128. Duty of Ruler of a State as respects Federal subjects.

(1) The executive authority of every Federated State shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation so far as it is exercis-

able in the State by virtue of a law of the Federal Legislature which applies therein.

(2) If it appears to the Governor-General that the Ruler of any Federated State has in any way failed to fulfil his obligations under the preceding subsection, the Governor-General, acting in his discretion, may after considering any representations made to him by the Ruler issue such directions to the Ruler as he thinks fit :

Provided that, if any question arises under this section as to whether the executive authority of the Federation is exercisable in a State with respect to any matter or as to the extent to which it is so exercisable, the question may, at the instance either of the Federation or the Ruler, be referred to the Federal Court for the determination by that Court in the exercise of its original jurisdiction under this Act.

Decision of Complaints Re: Water Supplies

Section 131. Federal Courts to assist Commissions appointed. Orders to be executed as if they were only of Courts.

(1) If the Governor-General receives such a complaint as aforesaid, he shall, unless he is of opinion that the issues involved are not of sufficient importance to warrant such action, appoint a Commission consisting of such persons having special knowledge and experience in irrigation, engineering, administration, finance or law, as he thinks fit, and request that Commission to investigate in accordance with such instructions as he may give to them, and to report to him on, the matters to which the complaint relates, or such of those matters as he may refer to them.

(2) A commission so appointed shall investigate the matters referred to them and present to the Governor-General a report setting out the facts as found by them and making such recommendations as they think proper.

(3) If it appears to the Governor-General upon consideration of the Commission's report that anything therein contained requires explanation, or that he needs guidance upon any point not originally referred by him to the Commission, he may again refer the matter to the Commission for further investigation and a further report.

(4) For the purpose of assisting a Commission appointed under this section in investigating any matters referred to them, the Federal Court, if requested by the Commission so to do, shall make such orders and issue such letters of request for the purposes of the proceedings of the Commission as they may make or issue in the exercise of the jurisdiction of the Court.

(5) After considering any report made to him by the Commission, the Governor-General shall give such decision and make such order, if any, in the matter of the complaint as he may deem proper :

Provided that if, before the Governor-General has given any decision, the Government of any Province or the Ruler of any State affected request him so to do, he shall refer the matter to His Majesty in Council and His Majesty in Council may give such decision and make such order, if any, in the matter as he deems proper.

(6) Effect shall be given in any Province or State affected, to any order made under this section by His Majesty

in Council or the Governor-General, and any Act of Provincial Legislature or of a State which is repugnant to the order shall, to the extent of the repugnancy, be void.

(7) Subject as hereinafter provided the Governor-General, on application made to him by the Government of any Province, or the Ruler of any State affected, may at any time, if after a reference to and report from, a Commission appointed as aforesaid he considers it proper so to do, vary any decision or order given or made under this section :

Provided that, where the application relates to a decision or order of His Majesty in Council and in any other case if the Government of any Province or the Ruler of any State affected request him so to do, the Governor-General shall refer the matter to His Majesty in Council, and His Majesty in Council may, if he considers proper so to do, vary the decision or order.

(8) An order made by His Majesty in Council or the Governor-General under this section may contain directions as to the Government or persons by whom the expenses of the Commission and any costs incurred by any Province, State or persons in appearing before the Commission are to be paid, and may fix the amount of any expenses or costs, to be so paid, and so far as it relates to expenses or costs, may be enforced as if it were an order made by the Federal Court.

(9) The functions of the Governor-General under this section shall be exercised by him in his discretion.

See. 133. Jurisdiction by Court excluded.

Notwithstanding anything in this Act, neither the Federal Court nor any other Court shall have jurisdiction to entertain any action or suit in respect of any matter if action in respect of that matter might have been taken under any of the three last preceding sections by the Government of Province, the Ruler of a State, or the Governor-General.

Sec. 193. Objections of Railway Authority and Federated States to afford mutual traffic facilities and to avoid unfair discrimination etc.

(1) It shall be the duty of the Authority and every Federated State so to exercise their powers in relation to the railways with which they are respectively coneerned as to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from those railways, including the receiving, forwarding, and delivering of through traffic at through rates, and as to secure thar there shall be between one railway system and another no unfair discrimination, by the granting of undue preferences or otherwise, and no unfair or uneconomic competition.

(2) Any complaint by the Authority against a Federated State or by a Federated State against the Authority on the ground that the provisions of the preceding subsection have not been complied with shall be made to and determined by the Railway Tribunal.

Section 194. Appeal by State to Railway Tribunal from certain directions of Railway Authority.

If the Authority, in the exercise of any executive authority of the Federation in relation to interchange of traffic or maximum or minimum rates and fares or station or service terminal charges, give any direction to a Federated State, the State may complain that the direction discriminates unfairly against the railways of the State or imposes on the State an obligation to afford facilities which are not in the circumstances reasonable, and any such complaint shall be determined by the Railway Tribunal.

Section 195. Construction and reconstruction of railways.

(1) The Governor-General acting in his discretion shall make rules requiring the Authority and any Federated State to give notice in such cases as the rules may prescribe of any proposal for constructing a railway or for altering the alignment or gauge of a railway, and to deposit plans.

(2) The rules so made shall contain provisions enabling objections to be lodged by the Authority or by a Federated State on the ground that the carrying out of the proposal will result in unfair or uneconomic competition with a Federal railway or a State railway as the case may be and, if an objection so lodged is not withdrawn within the prescribed time, the Governor-General shall refer to the Railway Tribunal the question whether the proposal ought to be carried into effect, either without modification or with such modification as the Tribunal may approve, and the proposal shall not be proceeded with save in accordance with the decision of the Tribunal.

(3) This section shall not apply in any case where the Governor-General in his discretion certifies that for reasons connected with defence effect should, or should not, be given to a proposal.

Section 196. Railway Tribunal.

(1) There shall be a Tribunal (in this Act referred to as "the Railway Tribunal") consisting of a President and two other persons to be selected to act in each case by the Governor-General in his discretion from a panel of eight persons appointed by him in his discretion, being persons with railway, administrative, or business experience.

(2) The President shall be such one of the judges of the Federal Court as may be appointed for the purpose by the Governor-General in his discretion after consultation with the Chief Justice of India and shall hold office for such period of not less than five years as may be specified in the appointment, and shall be eligible for re-appointment for a further period of five years or any less period:

Provided that, if the President ceases to be a judge of the Federal Court, he shall thereupon cease to be President of the Tribunal and, if he is for any reason temporarily unable to act, the Governor-General in his discretion may after the like consultation appoint another judge of the Federal Court to act for the time being in his place.

(3) It shall be the duty of the Railway Tribunal to exercise such jurisdiction as is conferred on it by this Act, and for that purpose the Tribunal may make such orders, including interim orders, orders varying or discharging a direction or order of the Authority, orders for the payment of

compensation or damages and of costs and orders for the production of documents and the attendance of witnesses, as the circumstances of the case may require, and it shall be the duty of the Authority and of every Federated State and of every other person or authority affected thereby to give effect to any such order.

(4) An appeal shall lie to the Federal Court from any decision of the Railway Tribunal on a question of Law, but no appeal shall lie from the decision of the Federal Court on any such appeal.

(5) The Railway Tribunal or the Federal Court, as the case may be, may, on application made for the purpose, if satisfied that in view of an alteration in the circumstances it is proper so to do, vary or revoke any previous order made by it.

(6) The President of the Railway Tribunal may, with the approval of the Governor-General in his discretion, make rules regulating the practice and procedure of the Tribunal and the fees to be taken in proceedings before it.

(7) Subject to the provisions of this section relating to appeals to the Federal Court, no Court shall have any jurisdiction with respect to any matter with respect to which the Railway Tribunal has jurisdiction,

(8) There shall be paid out of the revenues of the Federation to the members of the Railway Tribunal other than the President such remuneration as may be determined by the Governor-General in his discretion, and the administrative expenses of the Railway Tribunal, including any such remuneration as aforesaid, shall be charged on the revenues of the Federation, and any fees or other moneys taken by the Tribunal shall form part of those revenues.

The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Railway Tribunal in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

Section 198. Railways in Indian States which have not federated.

If and in so far as His Majesty's representative for the exercise of the functions of the Crown in its relations with Indian States may entrust to the Authority the performance of any functions in relation to railways in an Indian State which is not a Federated State, the Authority shall undertake the performance of those functions.

Section 199. Official directors of Indian railway companies.

Any powers of the Secretary of State in Council with respect to the appointment of directors and deputy directors of Indian Railway Companies shall be exercised by the Governor-General in his discretion after consultation with the Authority.

The Federal Court

Section 200. Establishment and constitution of Federal Court.

(1) There shall be a Federal Court consisting of a Chief Justice of India and such number of other Judges as His Majesty may deem necessary, but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for anincrease

in the number of judges, the number of puisne judges shall not exceed six.

(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty-five years:

Provided that—

(a) a judge may by resignation under his hand addressed to the Governor-General resign his office:

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought, on any such ground, to be removed.

(3) A person shall not be qualified for appointment as a judge of the Federal Court unless he—

(a) has been for at least five years a judge of a High Court in British India or in a Federated State; or

(b) is a barrister of England or Northern Ireland of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

(c) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession.

Provided that—

(i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or when first appointed to judicial office was, a Barrister, a member of the Faculty of Advocates or a pleader; and

(ii) in relation to the Chief Justice of India, for the references in paragraphs (b) and (c) of this subsection to ten years there shall be substituted references to fifteen years.

In computing for the purposes of this subsection the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which a person has held judicial office after he became a barrister, a member of the Faculty of Advocates or a pleader, as the case may be, shall be included.

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office, make and subscribe before the Governor-General or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

Section 201. Salaries etc., of Judges.

The judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Section 202. Temporary appointment of acting Chief Justice.

If the office of Chief Justice of India becomes vacant, or if the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion appoint for the purpose.

Section 203. Seat of Federal Court.

The Federal Court shall be a court of record and shall sit in Delhi and at such other place or places, if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time appoint.

Section 204. Original jurisdiction of Federal Court.

(1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other court have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question whether of law or fact on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to:-

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute;

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment.

Section 205. Appellate jurisdiction of Federal Court in appeals from High Courts in British India.

(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British

India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly,

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

Section 206. Power of Federal Legislature to enlarge appellate jurisdiction.

(1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act an appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall lie under any such Act unless—

(a) the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(b) the Federal Court gives special leave to appeal.

(2) If the Federal Legislature makes such provision as is mentioned in the last preceding subsection, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave.

(3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

Section 207. Appellate jurisdiction of Federal Court in appeals from High Courts in Federated States.

(1) An appeal shall lie to the Federal Court from a High Court in a Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature.

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein.

Section 208. Appeals to His Majesty in Council.

An appeal may be brought to His Majesty in Council from a decision of the Federal Court—

(a) from any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of any State, or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature without leave; and

(b) in any other case, by leave of the Federal Court or of His Majesty in Council.

Section 209. Form of Judgment on appeal.

(1) The Federal Court shall, where it allows an appeal, remit the case to the court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against, and the court from which the appeal was brought shall give effect to the decision of the Federal Court.

(2) Where the Federal Court upon any appeal makes any order as to the cost of the proceedings in the Federal Court, it shall, as soon as the amount of the costs to be paid is ascertained, transmit its order for the payment of that sum to the court from which the appeal was brought and that court shall give effect to the order.

(3) The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of

execution in any case under appeal to the Court, pending the hearing of the appeal, and execution shall be stayed accordingly.

Section 210. Enforcement of decrees and orders of Federal Court and orders as to discovery &c.

(1) All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court,

(2) The Federal Court shall, as respects British India and the Federated States, have power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or in the investigation or punishment of any contempt of court, which any High Court in British India has power to make as respects the territory within its jurisdiction, and any such orders, and any orders of the Federal Court as to the costs of and incidental to any proceedings therein, shall be enforceable by all courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest court exercising civil or criminal jurisdiction, as the case may be, in that part.

(3) Nothing in this section:—

(a) shall apply to any such order with respect to costs as is mentioned in subsection (2) of the last preceding section; or

(b) shall, as regards a Federated State, apply in relation to any jurisdiction exercisable by the Federal Court by reason only of the making by the Federal Legislature of such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Federal Court.

Section 211. Letters of request to Federated States.

Where in any case the Federal Court require a special case to be stated or restated by, or remit a case to, or order a stay of execution in a case from, a High Court in a Federated State, or require the aid of the civil or judicial authorities in a Federated State, the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State, and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require.

Section 212. Law declared by Federal Court and Privy Council to be binding on all Courts.

The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by all courts in British India, and so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, in any Federated State.

Section 213. Power of Governor General to consult Federal Court.

(1) If at any time it appears to the Governor General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to that Court for consideration, and the court may, after such hearing as they think fit, report to the Governor General thereon.

(2) No report shall be made under this section save in accordance with an opinion delivered in open Court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this subsection shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.

Section 214. Rules of Court, &c.

(1) The Federal Court may from time to time, with the approval of the Governor-General in his discretion, make rules of Court for regulating generally the practice and procedure of the Court, including rules as to the persons practising before the Court, as to the time within which appeals to the Court are to be entered, as to the costs of and incidental to any proceedings in the Court, and as to the fees to be charged in respect of proceedings therein, and in particular may make rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay.

(2) Rules made under this section may fix the minimum number of judges who are to sit for any purpose, so however that no case shall be decided by less than three judges:

Provided that, if the Federal Legislature makes such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of this Court, the rules shall provide for the constitution of a special division of the Court for the purpose of deciding all cases which would have been within the jurisdiction of the Court even if its jurisdiction had not been so enlarged,

(3) Subject to the provisions of any rules of Court, the Chief Justice of India shall determine what judges are to

constitute any division of the Court and what judges are to sit for any purpose.

(4) No judgment shall be delivered by the Federal Court save in open Court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this subsection shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment.

(5) All proceedings in the Federal Court shall be in the English Language.

Section 215. Ancillary powers of Federal Court.

The Federal Legislature may make provision by Act for conferring upon the Federal Court such supplemental powers not inconsistent with any of the provisions of this Act as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Act,

Section 216. Expenses of Federal Court.

(1) The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the revenues of the Federation, any fees or other moneys taken by the Court shall form part of those revenues.

(2) The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Federal Court in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

Section 217. Construction of references to High Courts in States.

References in any provision of this part of this Act to a High Court in a Federated State shall be construed as references to any Court which His Majesty may, after communication with the Ruler of the State declare to be a High Court for the purposes of that provision.

Section 218. Savings.

Nothing in this chapter shall be construed as conferring, or empowering the Federal Legislature to confer, any right of appeal to the Federal Court in any case in which a High Court in British India is exercising jurisdiction on appeal from a court outside British India, or as affecting any right of appeal in any such case to His Majesty in Council with or without leave,

Section 294. Foreign Jurisdiction.

(1) Neither the executive authority of the Federation nor the legislative power of the Federal Legislature shall extend to any area in a Federated State which His Majesty in signifying his acceptance of the Instrument of Accession of that State may declare to be an area theretofore administered by or on behalf of His Majesty to which it is expedient that the provisions of this subsection should apply, and references in this Act to a Federated State shall not be construed as including references to any such area:

Provided that—

(a) a declaration shall not be made under this subsection with respect to any area unless, before the execution by the Ruler of the Instrument of Accession, notice

has been given to him of His Majesty's intention to make that declaration;

(b) if His Majesty with the assent of the Ruler of the State relinquishes his powers and jurisdiction in relation to any such area or any part of any such area, the foregoing provisions of this subsection shall cease to apply to that area or part, and the executive authority of the Federation and the legislative power of the Federal Legislature shall extend thereto in respect of such matters and subject to such limitations as may be specified in a supplementary Instrument of Accession for the State.

Nothing in this subsection applies to any area if it appears to His Majesty that jurisdiction to administer the area was granted to him solely in connection with the railway.

(2) Subject as aforesaid and to the following provisions of this section, if, after the accession of a State becomes effective, power or jurisdiction therein with respect to any matter is, by virtue of the Instrument of Accession of the State, exercisable, either generally or subject to limits, by the Federation, the Federal Legislature, the Federal Court, the Federal Railway Authority, or a Court or an authority exercising the power or jurisdiction by virtue of an Act of the Federal Legislature, or is, by virtue of an agreement made under Part VI of this Act in relation to the administration of a law of the Federal Legislature, exercisable, either generally or subject to limits, by the Ruler or his officers, then any power or jurisdiction formerly exercisable on His Majesty's behalf in that State, whether by virtue of the Foreign Jurisdiction Act, 1890, or otherwise, shall not be exercisable in that State with respect to that matter or, as the case may be, with respect to that matter within those limits.

(3) So much of any law as by virtue of any power exercised by or on behalf of His Majesty to make laws in a State is in force in a Federated State immediately before the accession of the State becomes effective and might by virtue of the Instrument of Accession of the State be re-enacted for that State by the Federal Legislature, shall continue in force and be deemed for the purposes of this Act to be a Fedaral law so re-enacted;

Provided that any such law may be repealed or amended by Act of the Federal Legislature and unless continued in force by such an Act shall cease to have effect on the expiration of five years from the date when the accession of the State becomes effective.

(4) Subject as aforesaid, the powers and jurisdiction exercisable by or on behalf of His Majesty before the commencement of Part III of this Act in Indian States shall continue to be exercisable, and any Order in Council with respect to the said powers or jurisdiction made under the Foreign Jurisdiction Act, 1890, or otherwise, and all delegations, rules and orders made under any such Order, shall continue to be of full force and effect until the Order is amended or revoked by a subsequent Order:

Provided that nothing in this subsection shall be construed as prohibiting His Majesty from relinquishing any power of jurisdiction in any Indian State.

(5) An Order in Council made by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, empowering any person to make rules and orders in respect of Courts or adminis-

trative authorities acting for any territory shall not be invalid by reason only that it confers, or delegates powers to confer, on courts or administrative authorities power to sit or act outside the territory in respect of which they have jurisdiction of functions, or that it confers, or delegates power to confer, appellate jurisdiction or functions on Courts or administrative authorities sitting or acting outside the territory.

(6) In the Foreign Jurisdiction Act, 1890, the expression "a British Court in a foreign country" shall, in relation to any part of India outside British India, include any person duly exercising on behalf of His Majesty any jurisdiction, civil or criminal, original or appellate, whether by virtue of an Order in Council or not, and for the purposes of section nine of that Act the Federal Court shall, as respects appellate jurisdiction in cases tried by a British Court in a Federated State, be deemed to be a Court held in a British Possession or under the authority of His Majesty.

(7) Nothing in this Act shall be construed as limiting any right of His Majesty to determine by what Courts British subjects and subjects of foreign countries shall be tried in respect of offences committed in Indian States.

(8) Nothing in this section affects the provisions of this Act with respect to Berar.

Section 318. Provisions as to Federal Court and certain other Federal Authorities.

(1) Notwithstanding that the Federation has not yet been established, the Federal Court and the Federal Public Service Commission and the Federal Railway Authority shall come into existence and be known by

those names, and shall perform in relation to British India the like functions as they are by or under this Act to perform in relation to the Federation when established.

(2) Nothing in this section affects any power of His Majesty in Council to fix a date later than the commencement of Part III of this Act for the coming into operation, either generally or for particular purposes, of any of the provisions of this Act relating to the Federal Court, the Federal Public Service Commission or the Federal Railway Authority.

Seventh Schedule of the Act.

LEGISLATIVE LISTS.

List I.

Federal Legislative List.

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments; any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment; central intelligence bureau; preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

2. Naval, military and air force works; local self-Govenment in cantonment areas (not being cantonment

areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.

3. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

4. Ecclesiastical affairs, including European cemeteries.

5. Currency, coinage and legal tender.

6. Public debt of the Federation.

7. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication; Post Office Savings Bank.

8. Federal Public Services and Federal Public Service Commission.

9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

10. Works, lands and buildings vested in, or in the possession of, His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to Provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.

12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.

13. The Benares Hindu University and the Aligarh Muslim University.

14. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal Meteorological Organisations.

15. Ancient and historical monuments; archaeological sites and remains.

16. Census.

17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British Subjects domiciled in the United Kingdom; pilgrimages to places beyond India.

18. Port quaratine; seamen's and marine hospitals, and hospitals conected with port quaratine.

19. Import and export across customs frontiers as defined by the Federal Government.

20. Federal railways: the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

21. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

22. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

23. Fishing and fisheries beyond territorial waters.

24. Aircraft and air navigation; the provision of aerodromes regulation and organisation of air traffic and of aerodromes.

25. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

26. Carriage of passengers and goods by sea or by air.

27. Copyright, inventions, designs, trademarks and merchandise marks.

28. Cheques, bills of exchange, promissory notes and other like instruments.

29. Arms; firearms; ammunition.

30. Explosives.

31. Opium, so far as regards cultivation and manufacture, or sale for export.

32. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.

33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit.

34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.

35. Regulation of labour and safety in mines and oilfields.

36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

37. The Law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.

38. Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State.

39. Extention of the powers and jurisdictions of members of a police force belonging to any part of British

India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorised by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purpose of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry.

46. Corporation tax.

47. Salt.

48. State lotteries.

49. Naturalisation.

50. Migration within India from or into a Governor' Province or a Chief Commissioner's Province.

51. Establishment of standards of weight.

52. Ranchi European Mental Hospital.

53. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorised by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

54. Taxes on income other than agricultural income.

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

56. Duties in respect of succession to property other than agricultural land.

57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts,

58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights.

59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

LIST II

Provincial Legislative List

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation of all Courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention.

2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other units for the use of prisons and other institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service Commissions.

7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions controlled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorised by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before committees of the Provincial Legislature.

13. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

14. Public health and sanitation; hospitals and dispensaries; registration of births and deaths.

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burials and burial grounds.

17. Education.

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolutions of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks.

27. Trade and commerce within the Province, market and fairs; money lending and money lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

32. Relief of the poor; unemployment.

33. The incorporation, regulation, and winding-up of corporations other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

34. Charities and charitable institutions; charitable and religious endowments.

35. Theatres, dramatic performances and cinemas; but not including the sanction of cinematograph films for exhibition.

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

39. Land revenue, including the assessment and collections of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(c) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation Taxes.

46. Taxes on professions, trades, callings and employments.

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland water-ways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

LIST III

Concurrent Legislative List

PART I

1. Criminal Law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrator-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any court.

PART II

26. Factories.

27. Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions.

28. Unemployment insurance.

29. Trade unions; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards—mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland water-ways.

33. The sanctioning of cinematograph films for exhibition.

34. Persons subjected to preventive detention under Federal authority.

35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

APPENDIX B

Draft Instrument of Accession

(This form will require adaptation to certain States with limited powers).

Whereas proposals for the establishment of an Indian Federation, comprising such Indian States as may accede thereto and the Provinces of India constitued an autonomous Province, have been discussed between representatives of His Majesty's Government, of the Parliament of the United Kingdom, of British India and of the Provinces and Rulers of the Indian States.

And whereas a constitution for a Federation of India has been approved by Parliament and embodied in the Government of India Act 1935, but it is by that Act provided that the Federation shall not be established until such date as His Majesty may by proclamation declare:

And whereas the Act cannot apply to any of the territories of A. B. save with his consent and concurrence:

And whereas A. B. in the exercise of the sovereignty in and over X, in him vested, is desirous of acceding to the said Federation:

1. Now, therefore, A. B. hereby declares that, subject to his Majesty's assent, he accedes to the Federation, and subject always to the terms of this Instrument declares his acceptance of the provisions of the said Act as applicable to his State and to his subjects with the intent that His Majesty the King, the Governor-General of India, the Federal

Appendix B* Taken from A White Paper Cmd. 4843 March 1935.

Legislature, the Federal Court and any other Federal Authority established for the purposes of the Federation may exercise in relation to his State and to his subjects such functions as may be vested in them by or under the said Act, in so far as the exercise thereof is not inconsistent with any of the provisions of this Instrument.

2. And A. B. hereby declares that he accepts the matters specified in the First Schedule to this Instrument as the matters with respect to which the Federal Legislature shall have power to make laws in relation to his State and to his subjects, but subject in each case to the conditions and limitations, if any, set out in the said Schedule.

3. And A. B. hereby declares that he assumes the obligation of ensuring that due effect is given to the provisions of the said Act within the territories of his State, so far as they are applicable therein by virtue of this Instrument.

4. And A. B. hereby declares that the privileges and immunities, as defined in Part VII of the said Act (see Section 147), which are enjoyed by his State, are those specified in the Third Schedule to this Instrument, that the annual values thereof, so far as they are not fluctuating or uncertain are those specified in the said Schedule, and that he agrees that the values to be attributed to such of them as are fluctuating or uncertain in value shall be determined from time to time in accordance with the provisions of that Schedule.

5. And A. B. agrees that this Instrument shall be binding on him as from the date on which His Majesty signifies his acceptance thereof provided that if the said Federation is not established before the day of

.....nineteen hundred and thirty....., this Instrument shall, on that day become null and void for all purposes whatsoever.

6. And A. B. hereby declares that save as otherwise expressly provided in this Instrument he reserves the sovereignty in and over X, in him vested.

7. And A. B. hereby declares that he makes these declarations for himself, his heirs and successors, and that accordingly any reference in this Instrument to A. B. is to be construed as including a reference to his heirs and successors.

Schedules

Note:—The following Article is intended for inclusion in the Instrument only in the case of a State in respect of which provision is made in the Instrument for an agreement as contemplated in Section 125 of the Act.

And whereas A. B. is desirous that functions in relation to the administration in his State of laws of the Federal Legislature applying therein shall be exercised by himself and by his officers, and the terms of an agreement in that behalf have been mutually agreed between A. B. and the Governor-General and are set out in the second Schedule to this Instrument:

Now, therefore, A. B. hereby declares that he accedes to the Federation on the assurance that the said Agreement will be executed and the Agreement, when executed, shall be deemed to form part of the Instrument and shall be construed therewith.

N. B.—The Second Schedule to the Act sets out the provisions which may be amended without affecting the Accession of a State. Section 6 (5) provides as follows:—

It shall be a term of every Instrument of Accession that the provisions of this Act mentioned in the Second Schedule thereto, may, without affecting the accession of the State, be amended by or by authority of the Parliament, but no such amendment shall, unless it is accepted by the Ruler in a supplementary Instrument, be construed as extending the functions which by virtue of the Instrument are exercisable by His Majesty or any Federal Authority in relation to the State.

APPENDIX C

Forms of Oath of A Federal Judge or The Chief Justice

(FOURTH SCHEDULE. FORMS 4 & 5)

Form of judicial oath or affirmation to be taken or made by a British subject:—

"I. A. B., having been appointed Chief Justice (or a judge) of the.....Court, do solemnly swear (or affirm) that I will be faithful and bear true allegiance to His Majesty the King, Emperor of India, His heirs and successors and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Form of judicial oath or affirmation to be taken or made by a subject of the Ruler of an Indian State:—

"I. A. B., having been appointed Chief Justice (or a judge) of the Court, do solemnly swear (or affirm) that saving the faith and allegiance which I owe to C. D., his heirs and successors, I will be faithful and bear true allegiance in my judicial capacity to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

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4	30	,, sovereignity	,, sovereignty
5	10	,, ,,	,, ,,
6	11	,, ,,	,, ,,
10	19	,, ederating	,, federating
16	6	,, outhority	,, authority
16	20	,, independant	,, independent
22	1	,, a chief	,, the chief
23	12	,, for	,, from
24	17	,, informity	,, infirmity
24	29	,, Governer	,, Governor
26	20	,, tranquility	,, tranquillity
27	11	,, Judical	,, Judicial
29	10	,, on	,, an
49	23	omit 'in'	
50	7	for al	,, all
59	27	,, prohibits	,, prohibit
60	27	omit 'and'	
62	12	for an whether	,, whether an
73	21	,, soverignties	,, sovereignties
82	23	,, Soverign	,, Sovereign
84	5	,, jn	,, in
87	17	,, *In the*	,, In the

102	1	omit 'V'		
103	16	add 153	after	1914 A. C.
103	19	for Husdon	read	Hudson
106	15	,, Fllis	,,	Fillis
109	14	,, Consitution	,,	Constitution
110	1	,, Soverign	,,	Sovereign
131	11	Insert 'a'	after	form
135	21	for 'is'	read	are
136	22	,, 'are'	,,	is
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